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The Sikes Act Improvement Act of 1997:
Examining the Changes for the Department of Defense

By: Major Teresa K. Hollingsworth

A Thesis submitted to the Faculty of the
George Washington University Law School
in partial satisfaction of the requirements
for the degree of Master of Laws

August 31, 1998

ABSTRACT

The Sikes Act Improvement Act of 1997 (SAIA) was passed as Title XXIX of the National Defense Authorization Act for Fiscal Year 1998. These latest amendments to the 1960 Sikes Act levy significant new requirements on the Department of Defense (DoD) and the military departments in the area of natural resources management on military installations. Involved in negotiations over several precursory bills, the DoD and the military services began implementing many of the requirements called for by the SAIA about a year before it passed. Because the DoD based its guidance in part on a prediction of what the SAIA would ultimately contain, its implementing guidance and the regulations promulgated subsequently by the military departments differ somewhat from the terms of the statute. Additionally, several requirements under the 1997 Amendments are currently the subject of draft DoD guidance to the military departments. The purpose of this paper is to examine the 1997 Amendments to the Sikes Act, explore the legal issues raised, and discuss their potential impact on the DoD natural resources management programs.

The Sikes Act Improvement Act of 1997: Examining the Changes for the Department of Defense

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I. INTRODUCTION

The Sikes Act Improvement Act of 1997 (SAIA)[1] was passed as Title XXIX of the National Defense Authorization Act for Fiscal Year 1998.[2] These latest amendments to the 1960 Sikes Act[3] levy significant new requirements on the Department of Defense (DoD) and the military departments[4] in the area of natural resources management on military installations. Involved in negotiations over several precursory bills, the DoD and the military services began implementing many of the requirements called for by the SAIA about a year before it passed.[5] Because the DoD based its guidance in part on a prediction of what the SAIA would ultimately contain, its implementing guidance and the regulations promulgated subsequently by the military departments differ somewhat from the terms of the statute.[6] Additionally, several requirements under the 1997 Amendments are currently the subject of draft DoD guidance to the military departments. The purpose of this paper is to examine the 1997 Amendments to the Sikes Act, explore the legal issues raised, and discuss their potential impact on the DoD natural resources management programs.[7]

II. BACKGROUND

A. Natural Resources on Military Lands

The Department of Defense, the country's third largest land management

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[1] This paper will use the terms SAIA, 1997 Amendments, and Sikes Act Amendments interchangeably.
[2] Pub. L. No. 105-85, 111 Stat. 1629 (1997).
[3] 16 U.S.C.A. § 670a (amended 1997).
[4] The Department of Defense is an executive department of the United States and includes the Department of the Navy, the Department of the Army, and the Department of the Air Force, *see* 10 U.S.C.A. § 111. The Marine Corps is a separate military branch within the Department of the Navy, *see* 10 U.S.C.A. § 5013. This paper will use the terms military departments, military branches, military services, and services interchangeably.
[5] *See infra* notes 86-91 and accompanying text.
[6] *See infra* notes 96-105 and accompanying text.
[7] The scope of this paper does not extend to a discussion of general conformity under the Clean Air Act (*see* 42 U.S. C. §7506(c)), which may impact activities contained within Integrated Natural Resource

department,[8] manages about 25 million acres of federal land.[9] The primary purpose of DoD lands, which are allocated among approximately 400 major military installations,[10] is to meet operational and training requirements of the military departments.[11] However, the lands also serve as habitat for numerous endangered species,[12] and contain important cultural resources.[13] In comparison to other federal landholdings, military land, much of it

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Management Plans.

[8] *Department of Defense and Endangered Species Act: Hearing Before the House of Representatives Comm. on Resources*, 104th Cong. (1996) (Statement of Ms. Sherri W. Goodman, Deputy Under Secretary of Defense for Environmental Security) [hereinafter Goodman, Apr. 17, 1996]. *Cf.* L. Peter Boice, *Defending our Nation and its Biodiversity*, ENDANGERED SPECIES BULL. (Dep't of the Interior/Fish and Wildlife Serv., Washington, D.C.), Jan./Feb. 1997, at 4 [hereinafter Boice] (stating the Department of Defense is the nation's fifth largest Federal land management department). *Id.*

[9] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Ms. Sherri W. Goodman, Deputy Undersecretary of Defense for Environmental Security) [hereinafter Goodman, June 29, 1994]. Additionally, "the National Guard and Reserve components manage approximately one million acres on over 80 sites in 54 States and Territories," *see* H.R. REP. NO. 104-107(II) (1995). For a discussion of whether the SAIA applies to state-owned National Guard lands *see infra* notes 104-105 and accompanying text.

[10] Goodman, Apr. 17, 1996, *supra* note 8. *Cf.* Boice, *supra* note 8 (asserting DoD has more than 425 major military installations). *Id.*

[11] Department of Defense Instruction (DoDI) 4715.3, Environmental Conservation Program, at para. D(1)(d) (May 3, 1996) [hereinafter DoDI 4715.3]. *See also* Goodman, Apr. 17, 1996, *supra* note 8:

> DoD land is needed to support readiness, testing of new weapon systems, testing of munitions, deployment of weapon systems, and combat training exercises. Specific and unique natural features of the land are crucial to military readiness. To have the ability to deploy and fight successfully anywhere in the world, the armed forces must train in a wide variety of climatic and terrain conditions. Accordingly, training areas are located throughout the United States on grasslands, deserts, coastal areas, forests, and tundra. For example, desert environments are used for maneuvers that involve large, mechanized battalions; coastal zones and beaches provide the setting for missile launches and amphibious landings; forested areas are essential for small arms combat training; and large open areas are needed to accommodate air-to-ground bombing ranges. *Id.*

[12] J. Douglas Ripley and Michele Leslie, *Conserving Biodiversity on Military Lands*, FED. FACILITIES ENVTL. J. 93, 95 (Summer 1997) [hereinafter Ripley and Leslie] (estimating over 200 species listed under the Endangered Species Act as well as 350 candidate species inhabit DoD lands). *Id. See e.g.,* Thomas H. Lillie and J. Douglas Ripley, *Conservation Issues*, 18 NAT. AREAS J. 73, 74 (1998) [hereinafter Lillie and Ripley] (describing some of the more well-known cases of endangered species inhabiting military land, such as the red-cockaded woodpecker at the Army's Fort Bragg, North Carolina; and the Sonoran pronghorn antelope at the Goldwater Air Force Range in Arizona). *Id. See also Fiscal Year 99 Department of the Navy Environmental Budget: Hearing Before the Subcomm. on Readiness of the Senate Comm. on Armed Services*, 105th Cong. (1998) (statement of Mr. Robert B. Pirie, Jr., Assistant Secretary of the Navy for Installations and Environment) (stating federally designated critical habitats exist on four Navy and three Marine Corps installations). *Id.*

[13] Goodman, June 29, 1994, *supra* note 9.

relatively pristine,[14] has "a disproportionate value in terms of biodiversity."[15] The U.S. Fish and Wildlife Service estimates that 19 million acres of DoD lands are manageable as habitat for fish and wildlife.[16] Additionally, "some of the military's lands are valuable for grazing, agriculture, timber and mining."[17] Overall, practically every ecosystem found in the United States is represented on DoD lands,[18] illustrating the "wide range of training environments and strategic locations that the military requires to maintain readiness."[19]

The military's approach toward resources management, reflecting changes in public policy, has matured since World War II and expanded to incorporate technical and scientific innovation.[20] In 1993, recognizing the importance of environmental issues, the Secretary of Defense created the office of Environmental Security "to integrate environmental considerations into defense policies and practices."[21] Among the goals of the office is to "be responsible stewards of the land DoD holds in public trust."[22] In 1994,

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[14] DEPARTMENT OF DEFENSE, COMMANDER'S GUIDE TO BIODIVERSITY (1996).
[15] Ripley and Leslie, *supra* note 12, at 95. The authors plotted the number of acres held by federal agencies in relation to the presence of species listed under the Endangered Species Act. *Id.*
[16] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Mr. Gary B. Edwards, Director, U.S. Fish and Wildlife Service) [hereinafter Edwards, June 29, 1994].
[17] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. (1994) (statement of Mr. Dave McCurdy, Chairman, Subcomm. On Military Installations and Facilities) [hereinafter McCurdy, June 29, 1994].
[18] *Id.*
[19] Ripley and Leslie, *supra* note 12, at 95.
[20] *Id.* at 96-100. WWII natural resources management efforts were largely directed toward erosion reduction and dust control. Post WWII efforts focused on renewable resources, such as timber production, agricultural out-leasing, and fishing and hunting programs. The Sikes Act of 1960 and the major environmental statutes of the 1970's – National Environmental Policy Act, Clean Water Act, Clean Air Act and the Endangered Species Act – had a profound impact on resources management on military lands, leading to a more holistic approach. *Id. See also* Goodman, June 29, 1994, *supra* note 9 (giving examples of military adjustments made to comply with environmental laws, such as modifying low-level flying routes, scheduling ground activities to avoid sensitive mating and nesting times, and moving artillery impact areas). *Id.*
[21] Goodman, June 29, 1994, *supra* note 9.
[22] *Id.*. The other major goals are to: "ensure DoD operations comply with environmental laws; clean up and reduce risk from contaminated sites; prevent pollution at the source whenever possible; promote development of dual-use environmental technologies; and protect the safety and health of our military and civilians." *Id.*

during testimony considering Sikes Act reauthorization, Ms. Goodman, the Deputy Under Secretary of Defense for Environmental Security, announced that ecosystem management represented the beginning of a "new chapter" of military land management.[23] According to the DoD policy published a short time later, the goal of ecosystem management is "to ensure that military lands support present and future training and testing requirements while preserving, improving, and enhancing ecosystem integrity."[24]

B. The Sikes Act (1960 – 1986)

The DoD credits the Sikes Act of 1960 as being "instrumental in helping the Department manage its unique natural resources."[25] Directed to the Secretary of Defense, the purpose of the 1960 Act was to 'promot[e] effectual planning, development, maintenance, and coordination of wildlife, fish, and game conservation and rehabilitation in military reservations.'[26] The legislative history reveals that the 1960 Act had as its unwitting pilot program an informal arrangement at Eglin Air Force Base, dating to before 1949, whereby the personnel patrolling Eglin would collect fees for hunting and fishing permits and use the money for restocking and conservation efforts.[27] This practice came under fire from the Comptroller General because no legislation authorized the base to retain the fees collected.[28] The Sikes Bill of 1949[29] legitimized the activity at Eglin, and directed the Secretary of the Air Force to "adopt suitable regulations for fish and game management in accordance with a general plan to be worked out with the Secretary of the

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[23] Goodman, June 29, 1994, *supra* note 9.
[24] DoDI 4715.3, *supra* note 8, at encl. 9.
[25] Goodman, June 29, 1994, *supra* note 9.
[26] Richard A. Jaynes, Natural Resource Management on Army Installations: DoD Policy Initiatives in a Statutory Chess Game, 30-31 (1997) (unpublished LL.M. thesis, The George Washington University) (on file with The George Washington University Law School Library) [hereinafter Jaynes].
[27] Jaynes, *supra* note 26, at 28.
[28] *Id.* at 29.
[29] Pub. L. No. 81-345, 63 Stat. 671 (1949).

Interior."[30] Although the bill did not require the state to be a party to the plan, the federal regulations were to 'not be inconsistent with, insofar as possible,' applicable Florida laws and regulations.[31]

The Sikes Act of 1960 kept the focus on fish and wildlife conservation, but expanded the scope of the Sikes Bill to include all domestic military reservations.[32] Instead of a general plan, the Act called for a "cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency."[33] Overall, the Act "gave congressional recognition to the significant potential for fish and wildlife management and recreation on [DoD] lands."[34]

The Sikes Act was amended in 1968 to authorize funds and to expand the program to include "the enhancement of wildlife habitat and the development of outdoor recreation facilities."[35] In 1974, amendments mandated that the scope of the plans include fish and wildlife habitat management, range rehabilitation, and the control of off-road vehicle traffic.[36] The Sikes Act was reauthorized in 1978[37] and 1982. The 1982 amendments expanded the scope of the Act to specifically include 'all species of fish, wildlife, and plants considered threatened or endangered.'[38] The next amendments, in 1986,[39] were partially in response to a 1984 study assessing natural resources management on Army

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[30] Jaynes, *supra* note 26, at 29.
[31] *Id.*
[32] 16 U.S.C.A. § 670a (amended 1997).
[33] *Id.*
[34] Edwards, June 29, 1994, *supra* note 16.
[35] Jaynes, *supra* note 26, at 36.
[36] H.R. REP. NO. 103-718, at 5-6 (1994). The amendments also established Title II of the Act making it applicable to the Department of Interior and the Department of Agriculture in managing Bureau of Land Management and Forest Service lands, as well as lands under the jurisdiction of the Department of Energy and the National Aeronautics and Space Administration, *see id.* at 6.
[37] Jaynes, *supra* note 26, at 39 (explaining that Congress tried to insert an accountability clause but the bill was vetoed by President Carter; the subsequent compromise bill deleted this clause and lowered the annual authorizations). *Id.*
[38] *Id.* at 39. *See also* H.R. REP. NO. 103-718, at 6 (1994).

installations.[40] Essentially, these amendments imposed multiple-use management principles on the DoD, while recognizing the "paramount importance" of the military mission.[41]

C. The 1997 Amendments

In 1993, the Sikes Act came up for reauthorization.[42] In the first session of the 103rd Congress, Representatives Gerry E. Studds[43] and Don Young[44] introduced House Bill 3300,[45] the Natural Resource Management on Military Lands Act of 1993, a Bill to Amend the Sikes Act.[46] This marked the beginning of a long and arduous process that ultimately culminated in the passage of the SAIA. The overarching concern put forth by the bill's proponents was that "comprehensive natural resource management is far from a reality on many installations."[47] The bill's sponsors blamed this shortcoming on the lack of an enforcement mechanism within the existing Sikes Act.[48]

In crafting a solution, the bill's drafters were particularly cognizant of the need to

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[39] Jaynes, *supra* note 26, at 38.
[40] *Id.* at 42, (citing RAND NATIONAL DEFENSE INSTITUTE, MORE THAN 25 MILLION ACRES: DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER, 4 (1996)).
[41] Jaynes, *supra* note 26, at 42-43. *See also* H.R. REP. NO. 103-718, at 6 (1994). The amendments required that:

> (1) DoD manage its wildlife and fishery resources with professionals trained in fish and wildlife management, providing sustained multi-purpose use and public access; (2) fish and wildlife plans be reviewed by all parties on a regular basis, not less than once every five years; and (3) any sale or lease of land or forest products be compatible with the fish and wildlife plan. *Id.*

[42] 16 U.S.C.A. § 670a (amended 1997).
[43] Democrat, Massachusetts, Chairman of the Committee on Merchant Marine and Fisheries.
[44] Republican, Alaska, Ranking Minority Member of the Subcommittee on Fisheries Management.
[45] H.R. 3300, 103rd Cong. (1993).
[46] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. On Military Installations and Facilities of the House of Representatives Comm. On Armed Services*, 103rd Cong. (1994) (statement of Mr. Gerry E. Studds, Chairman of the Comm. On Merchant Marine and Fisheries) [hereinafter Studds, June 29, 1994].
[47] *Id.* Specifically, Mr. Studds cited as problems that, "All too often, plans are not being prepared, are not being implemented, or – where implemented – lack coordination with, or integration into, other military activities." *Id.*
[48] *Id.*

ensure the implementation of natural resources management plans "without obstructing the cooperative relationship that should exist between [sic] DoD natural resource managers, the U.S. Fish and Wildlife Service, and the state fish and wildlife agencies."[49] Generally, the revisions introduced by House Bill 3300 were to (1) increase the scope of the plans from cooperative agreements for fish and wildlife to integrated natural resources management plans (INRMPs), "encompassing all natural resource management activities;"[50] (2) require the preparation and implementation of these plans on all military installations in the United States, unless the Secretary of Defense determined such a plan was inappropriate for a given installation;[51] (3) require a status report to Congress on the implementation of the plans;[52] and (4) institute a system of Notices of Violation (NOVs) for noncompliance with the Act.[53] These proposed changes defined the battleground for DoD negotiators over the course of the next few years until the 1997 public law was passed.

House Bill 3300 originally contained both criminal and civil penalties for noncompliance.[54] These 'compliance teeth' were seen as necessary by some proponents to elevate the priority of funding for the management plans mandated by the Act. At a subcommittee hearing, a spokesman for the National Wildlife Federation testified, "[The] Defense's own system is based totally on reaction to noncompliance. If you do not have a

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[49] *Id.*
[50] *Id.*
[51] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. v (1994) (H.R. 3300 § 3(a)(3)).
[52] *Id.* at vi (H.R. 3300 § 4(a), requiring an enumeration of those installations for which the DoD determines an INRMP is not appropriate and the corresponding reasons). *Id.*
[53] *Id.* at vii (H.R. 3300 § 5).
[54] *Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), Sept. 1994, at 2.

notice of violation, you do not have enforcement."[55] The president of the National Military Fish and Wildlife Association (NMFWA),[56] calling the compliance provisions the "heart and soul" of the bill, expressed doubt in DoD's ability to police its own regulatory programs.[57]

The DoD did not support the criminal and civil penalties and originally offered substitute language retaining the NOV system, but giving the U.S. Fish and Wildlife Service (USFWS) enforcement authority.[58] Soon thereafter, however, the DoD changed its position and eventually negotiated language that "eliminated all oversight of DoD natural resources programs by outside agencies."[59] The new provisions called for internal oversight and mandated compliance reports to Congress.[60]

The Committee on Merchant Marine and Fisheries, to which House Bill 3300 was

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[55] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 35 (1993) (Testimony of Mr. Gene Stout, Chairman of the Board of Directors, National Wildlife Federation).

[56] The NMFWA mission is to support professional management of all natural resources on military lands. Its membership consists of over 700 natural resources specialists from each of the four branches of service, the National Guard and Reserve Components, whose job it is to professionally manage all programs that relate to conservation and use of United States Department of Defense lands, *see Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. On Fisheries, Wildlife, and Oceans of the House of Representatives Comm. On Resources*, 104th Cong. (1995) (statement of Mr. Junior D. Kerns, President, NMFWA) [hereinafter Kerns, Mar. 16, 1995]. The NMFWA was heavily involved in the legislative process from the draft of H.R. 3300 to the passage of the 1997 Amendments, *see generally* FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), May 1994, Aug. 1994, Sept. 1994, June 1995.

[57] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 34 (1993) (Testimony of Mr. Wray, National Military Fish and Wildlife Association) [hereinafter Wray, Nov. 3, 1993] (asserting, "DoD's internal audit initiatives, such as [inspector general] inspections, and the more recent environmental compliance evaluations, have identified deficiencies but lack a serious follow-up.") *Id.*

[58] *Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), Sept. 1994, at 2.

[59] *Id.* *See also* Goodman, June 29, 1994, *supra* note 9 (explaining DoD's alternative approach to the NOV system would involve internal auditing procedures). *Id.*

[60] H.R. REP. NO. 103-718, at 3 (1994) (H.R. 3300 § 5); *see also Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), Sept. 1994, at 2.

referred, reported favorably upon it after amending it to remove the NOV provisions.[61] Explaining its conclusion that enforcement mechanisms were not necessary, the committee relied heavily on DoD's assurances that it would fund recurring projects and services.[62] The committee understood "recurring" activities to include the "production of game for hunting and fishing, the production of food and timber products, long-term implementation of endangered species programs, wildlife recreation programs, and the regular monitoring of wildlife."[63] The committee emphasized its view that these undertakings were "essential to the proper stewardship of military lands."[64] Although House Bill 3300 passed the House of Representatives on September 12, 1994, it did not become law as no action was taken in the Senate before the end of the 103rd Congress.[65]

On March 6, 1995, Congressmen Don Young, Gerry Studds, and Jim Saxton[66] introduced House Bill 1141,[67] the Sikes Act Improvement Amendments of 1995.[68] This bill contained essentially the same language agreed to during the previous Congress. At a hearing on the bill shortly after it was introduced, the president of the NMFWA conceded the compliance and enforcement provisions "may not be necessary at this time" based on the "mandatory language in the bill requiring INRMPs to be prepared and implemented and [the] Department of Defense commitment to fund preparation and implementation of [INRMPs]."[69] The bill was passed in the House by voice vote on July 11, 1995.[70] The

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[61] H.R. REP. NO. 103-718, at 1 (1994).
[62] H.R. REP. NO. 103-718, at 7 (1994).
[63] *Id.*
[64] *Id.*
[65] H.R. REP. NO. 104-107(II) (1995). *See also Sikes Act Amendment Fails, H.R. 3300 Dead for Now*, FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), Sept. 1994, at 2.
[66] Republican, New Jersey.
[67] H.R. 1141, 104th Cong. (1995).
[68] H.R. REP. NO. 104-107(II) (1995). *See also Sikes Act Update*, FISH AND WILDLIFE NEWS (The Nat'l Military Fish and Wildlife Ass'n, Newburg, Md.), June 1995 at 2.
[69] Kerns, Mar. 16, 1995, *supra* note 56.
[70] H.R. REP. NO. 104-878 (1997).

provisions of the bill were incorporated into the House version of the National Defense Authorization Act for Fiscal Year 1997.[71] However, the provisions again failed to become law because they were subsequently removed by the Conference Committee.[72]

In 1997, Congressmen Don Young and Jim Saxton co-sponsored House Bill 374,[73] a Bill to Reauthorize and Amend the Sikes Act.[74] This bill contained the same provisions that passed in the House during the previous Congress, but were not acted upon in the Senate.[75] This bill was passed by the House and the Senate and, after Conference Committee changes, was successfully attached to the National Defense Authorization Act for Fiscal Year 1998.[76]

The 1997 Amendments pose several interesting issues and challenges for the military departments and their commanders. These include the extent to which outside agencies and the public may influence the content of the plans; whether the National Environmental Policy Act applies to the plans; and issues concerning funding and implementation. The requirements of the 1997 legislation can be fully understood only in the context of the several bills that went before and the positions negotiated by each interested party. Therefore, to provide a comprehensive overview, these issues will be discussed against the backdrop of their legislative history. To more accurately assess the impact of the Amendments on the military services, this paper will also compare previous DoD and service guidance to the SAIA and subsequent military draft implementing

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[71] H.R. REP. NO. 104-878 (1997) (referring to H.R. 3230).
[72] H.R. REP. NO. 104-878 (1997).
[73] H.R. 374, 105th Cong. (1997).
[74] *Wildlife Management on Military Installations: Hearing on H.R.374 Before the Subcomm. On Fisheries Conservation, Wildlife and Oceans of the House of Representatives Comm. On Resources*, 105th Cong. (1997) (statement of Jim Saxton, Chairman, Subcommittee on Fisheries Conservation, Wildlife and Oceans) [hereinafter Saxton May 22, 1997].
[75] *Id.*
[76] Jaynes, *supra* note 26, at 80, (citing 143 CONG. REC. H4381 (daily ed. June 25, 1997) (statement of Rep.

guidance.

III. CHALLENGES OF THE 1997 AMENDMENTS

A. Mandatory Plans

Before the 1997 Amendments, the Sikes Act, by its terms, "authorized" the Secretary of Defense to

> carry out a program of planning for, and the development, maintenance, and coordination of, wildlife, fish, and game conservation and rehabilitation in each military reservation in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of the Interior, and the appropriate state agency designated by the state in which the reservation is located.[77]

In 1994, there were approximately 250 cooperative fish and wildlife management plans in effect for military installations.[78] Proponents of amending the statute, however, were dissatisfied with the cooperative plans, both in scope and effect.[79] The DoD agreed early on that it should undertake more comprehensive environmental planning. At a hearing on House Bill 3300, Ms. Goodman pledged support for ecosystem-based management on all military lands in general, and for "the development and implementation of integrated natural resource management plans for military installations" in particular.[80] Characterizing INRMPs as the "most effective means of ensuring . . . resource management decisions on DoD lands are made based on informed consideration of all relevant factors," Ms. Goodman described the DoD goal to complete at least sixty percent of the plans for all military installations by fiscal year (FY) 1996.[81] This goal stemmed from a requirement in the FY 1991-2001 Defense Planning Guidance that also called for

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Saxton)).
[77] 16 U.S.C.A. § 670a (amended 1997).
[78] Goodman, June 29, 1994, *supra* note 9.
[79] Studds, June 29, 1994, *supra* note 46.
[80] Goodman, June 29, 1994, *supra* note 9.
[81] *Id.*

the completion of natural and cultural resources inventories.[82] Currently, the DoD estimates a total of 461 installations are subject to the 1997 Sikes Act requirement to prepare and implement INRMPs.[83]

As of March 1995, the existing cooperative plans were still a source of dissatisfaction among the supporters for House Bill 1141. The president of the NMFWA expressed his opinion that some of the so-called plans were only cooperative agreements "that provide for cooperation, rather than management of resources."[84] Furthermore, he estimated that fewer than twenty-five percent of the cooperative plans "fully meet the requirements of the existing Sikes Act," and that fewer than ten percent "are properly integrated or address sustained military capability of the lands."[85]

Amidst the sometimes heated debate and shortly before the 1997 Amendments passed, the DoD promulgated policy guidance that seemingly predicted what would become law out of the pending legislation. DoD Instruction (DoDI) 4715.3, *Environmental Conservation Program*, May 3, 1996, requires INRMPs be "prepared, maintained, and implemented for all lands and waters under DoD control that have suitable habitat for conserving and managing natural ecosystems."[86] In response to the DoD guidance, the Army updated its existing regulation,[87] and the Air Force promulgated

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[82] *Id.*
[83] Interview with Mr. L. Peter Boice, Director of Conservation in the Office of the Deputy Under Secretary of Defense (Environmental Security) (July 1, 1998).
[84] Kerns, Mar. 16, 1995, *supra* note 56.
[85] *Id.*
[86] *Supra* note 11, at para. D(2)(b).
[87] Army Regulation (AR) 200-3, Natural Resources – Land, Forest and Wildlife Management (Feb. 28, 1995) [hereinafter AR 200-3], was supplemented by a Memorandum from the Department of the Army (Assistant Chief of Staff for Installation Management) to all subordinate headquarters, Subject: "Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMPs)" (Mar. 21, 1997) (on file with author) [hereinafter Army Guidance].

a new instruction.[88] Both services' guidance include exhaustive definitions of what INRMPs must contain and direct how to integrate them with other military plans.[89] The Navy had addressed INRMPs before the DoD Instruction was promulgated and did not update its existing guidance.[90] The Marine Corps also relied on its existing guidance relating to "Multiple Land Use Management Plans," which are similar to INRMPs.[91]

About a year and a half after the DoD promulgated its Instruction, the 1997 Amendments made the preparation and implementation of INRMPs mandatory.[92] Generally, the 1997 Amendments require that the Secretary of Defense "carry out a program to provide for the conservation[93] and rehabilitation of natural resources on military installations."[94] More specifically, the SAIA demands, "The Secretary of each military department shall prepare and implement an integrated natural resources management plan for each military installation . . . ."[95]

Significantly, the term "INRMP" is not defined within the Amendments. Legislative history indicates INRMPs represent an expanded and comprehensive version of the cooperative plans, reflecting the legislation's proponents' goal that DoD manage

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[88] Air Force Instruction (AFI) 32-7064, Integrated Natural Resources Management (Aug. 1, 1997) [hereinafter AFI 32-7064].
[89] *See id.* at Chapter 2 (giving procedures for implementing integrated natural resources management); *Id.* at Attachment 2 (providing a detailed outline of what an INRMP should contain); AR 200-3, *supra* note 87, at Chapter 9 (giving the scope of the plans and delineating specific criteria that must be met for the plans to be deemed integrated); Army Guidance, *supra* note 87, at para. 8(c) (listing what INRMPs must contain).
[90] *See* Operational Navy Instruction (OPNAVINST) 5090.1B, Chapter 22, Natural Resources Management, at para. 22-4.1(b) (Nov. 1, 1994) [hereinafter OPNAVINST 5090.1B, Chapter 22].
[91] *See* Marine Corps Order (MCO) 5090.2, Environmental Compliance and Protection Manual, Chapter 17, Natural Resources Management Program (Sep. 26, 1991).
[92] Pub. L. No. 105-85, § 2904(a).
[93] "Conservation" is not defined in the SAIA. *Cf.* DoDI 4715.3, *supra* note 11, at encl. 3, para. 4 (defining "conservation" as planned management, use and protection of natural cultural resources to provide sustainable use and continued benefit for present and future generations, and the prevention of exploitation, destruction, waste and/or neglect). *Id.*
[94] Pub. L. No. 105-85, § 2904(a).
[95] *Id.*

not only wildlife, but "the whole realm of natural resources."[96] However, a close look at the SAIA reveals a predominant emphasis on wildlife interests.[97] In contrast, the DoD focuses on multiple uses, with no preference of one over another.[98] The DoD Instruction defines INRMPs as "integrated plans based, on the maximum extent practicable, on ecosystem management that shows the interrelationships of individual components of natural resources management . . . to mission requirements and other land use activities affecting an installation's natural resources."[99] The DoD differentiates INRMPs from cooperative plans in that INRMPs require more coordination and consultation and more comprehensive information.[100] Because of DoD's unbiased approach to natural resources management, wildlife interest groups may challenge INRMPs as not fully conforming

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[96] *Natural Resource Management on Military Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. On Military Installations and Facilities of the House of Representatives Comm. On Armed Services*, 103rd Cong. (1994) (statement of Gene Stout, Chairman of the Board of Directors, National Wildlife Federation) [hereinafter Stout June 29, 1994].

[97] *See generally,* Jaynes, *supra* note 26, at 71-73.

[98] DoDI 4715.3, *supra* note 11, at encl. 7. *See also* Jaynes, *supra* note 26, at 71-73.

[99] DoDI 4715.3, *supra* note 11, at encl. 3, para. 12. *See id.* at encl. 3, para. 9 (defining Ecosystem Management as:

> A goal-driven approach to managing natural and cultural resources that supports present and future mission requirements; preserves ecosystem integrity; is at a scale compatible with natural processes; is cognizant of nature's time frames; recognizes social and economic viability within functioning ecosystems; is adaptable to complex and changing requirements; and is realized through effective partnerships among private, local, State, tribal, and Federal interests. Ecosystem management is a process that considers the environment as a complex system functioning as a whole, not as a collection of parts, and recognizes that people and their social and economic needs are a part of the whole.) *Id.*

See id. at encl. 3, para. 20 (defining Natural Resources as "all elements of nature and their environments of soil, air, and water . . .", including "nonliving resources such as minerals and soil components [and] living resources such as plants and animals.") *Id.*

[100] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. 147-148 (1994) (testimony of Ms. Sherri W. Goodman, Deputy Undersecretary of Defense for Environmental Security) [hereinafter Goodman testimony, June 29, 1994]. *See* Memorandum from the Deputy Undersecretary of Defense (Environmental Security) to the Deputy Assistant Secretaries of the Army, Navy, and Air Force and the Directory of the Defense Logistics Agency, Subject: "Implementation of Sikes Act Improvement Amendments DRAFT" (June 23, 1998) (on file with author) [hereinafter DoD Draft Guidance] (characterizing INRMPs as "comprehensive plans for the management of all installation natural resources (substantially expanded beyond the scope of fish and wildlife cooperative plans.)"). *See also* DoDI 4715.3, *supra* note 11, at encl. 7 (delineating specific contents of an INRMP).

with the terms of the SAIA.[101]

Although the SAIA fails to provide a specific meaning for "INRMP," it does provide definitions which demarcate the scope of the Amendments. The term "military installation" which replaces "military reservation" throughout the Sikes Act,[102] is defined by the Amendments as:

> (A) any land or interest in land owned by the United States and administered by the Secretary of Defense or the Secretary of a military department, except land under the jurisdiction of the Assistant Secretary of the Army having responsibility for civil works;
> (B) all public lands withdrawn from all forms of appropriation under public land laws and reserved for use by the Secretary of Defense or the Secretary of a military department . . . .[103]

The legislative history reflects the intent of the proponents for the term to encompass "lands controlled and managed by National Guard and Reserve components."[104] The definition of "military installation" found in the 1997 Amendments, however, falls short of being that expansive. The DoD position is that the statutory definition, as a matter of law, excludes state-owned National Guard lands, unless the federal government is a lessee or holds some other legal interest in the land.[105]

The scope of the 1997 Amendments is limited in other respects as well. The

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[101] *See* discussion of Administrative Procedure Act *infra* notes 118-124 and accompanying text.
[102] Pub. L. No. 105-85, § 2913 (changing the term "reservation" to "installation" wherever it appeared in the Act).
[103] Pub. L. No. 105-85, § 2911. Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters U.S. Air Force Environmental Division (Jul. 27, 1998) (withdrawn lands account for 17 million acres, which comprises 68% of DoD's 25 million acres).
[104] Kerns, Mar. 16, 1995, *supra* note 56:

> 'Military installation' must also include lands controlled and managed by National Guard and Reserve components. Today's integrated battlefields often require Reserve, Guard, and Regular Units to work side by side. The same is true on their training lands. Planning and management on their training lands is no less important than is maintenance of their equipment. . . . Military lands, no matter who manages them, are too precious to ignore. *Id.*

[105] Interview with Jim Van Ness, Associate DoD General Counsel for Environment and Installations (July 17, 1998).

mandate for creating INRMPs applies only to installations "in the United States,"[106] making the Sikes Act inapplicable to installations "on foreign soil,"[107] although it does include installations on Guam, Puerto Rico and on other territories and possessions of the U.S.[108] Furthermore, some military lands, although located in the U.S., will nonetheless be excused from complying with the provisions of the Act because "military installation" is defined to exclude land that is "subject to an approved recommendation for closure under the Defense Base Closure and Realignment Act of 1990."[109] Overall, the Amendments have the same applicability as the 1996 DoD Instruction governing the development and implementation of INRMPs.[110]

Another provision with the effect of narrowing the scope of the 1997 Amendments allows the Secretary of a military department to determine an INRMP is inappropriate for a given installation where significant natural resources do not exist.[111] Congress, however, retains oversight, requiring the Secretary of Defense to submit a report by November 18, 1998 listing all military installations for which an INRMP was deemed inappropriate, and explaining the underlying reasons for each determination.[112] To provide some uniformity to the military departments' conclusions that INRMPs are not necessary based on the absence of significant natural resources, the DoD drafted guidance

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[106] Pub. L. No. 105-85, § 2904(a).
[107] Memorandum from Headquarters Air Force, Environmental Division to Major Commands, Subject: "Draft Policy Memo for Implementation of Sikes Act Improvement Amendments," Attachment 1: Annotated Sikes Act with Air Force Interpretation 2 (June 22, 1998) (on file with author) [hereinafter Air Force Draft Guidance].
[108] *See* Pub. L. No. 105-85, § 2911 (defining "United States" to include "the states, the District of Columbia, and the territories and possessions of the United States"). *Id.*
[109] Pub. L. No. 105-85, § 2911.
[110] *See* DoDI 4715.3, *supra* note 11, at para. B (defining applicability and scope of instruction to include the military departments, U.S. territories and possessions, public lands withdrawn from all forms of appropriation under public land laws and reserved for use by the Department of Defense; but not the Civil Works function of the Army). *Id.*
[111] Pub. L. No. 105-85, § 2904(a).
[112] Pub. L. No. 105-85, § 2905.

that directs:

> An installation will normally require an INRMP if it undertakes more than one of the following activities: fish and wildlife management; land management; forest management; natural resource-based outdoor recreation; on-the-ground military missions operations. An INRMP will normally be required if an installation undertakes any of the following: threatened and endangered species management; commercial forestry activities; hunting and fishing management.[113]

The DoD draft guidance goes on to state that the acreage of an installation should not by itself determine the need for an INRMP,[114] but that the conclusion that an INRMP is not required should reflect the specific nature of an installation, or may be justified by negative findings of a biological survey.[115] Because this draft guidance is so specific, it may lead to more INRMPs being deemed "required" than under the 1996 Instruction which mandated INRMPs for "all lands and waters under DoD control that have suitable habitat for conserving and managing natural ecosystems."[116]

Since the military departments had already self-imposed the requirement for completing and implementing INRMPs by the time the amendments passed, the Act's mandate for INRMPs to be accomplished seems superfluous. However, the Amendments constitute a legal requirement where there was previously only a regulatory one, raising the specter of litigation for perceived noncompliance.[117] Under the Administrative

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[113] DoD Draft Guidance, *supra* note 100.
[114] *Id. But see* Army Guidance, *supra* note 87 (directing that INRMPs are not required for installations of 500 acres or less); AR 200-3, para. 9-2 (discussing criteria for the preparation of INRMPs); *cf.* Interview with Dr. Vic Diersing, Chief Conservation, Office of the Assistant Chief of Staff of the Army for Installation Management (June 4, 1998) (explaining that Army guidance is flexible enough to allow commanders to request an exception to prepare INRMPs for situations where an installation of 500 acres or less encompasses significant natural resources, or not to prepare an INRMP where a larger installation does not encompass significant natural resources). *Id.*
[115] DoD Draft Guidance, *supra* note 100.
[116] DoDI 4715.3, *supra* note 11, at para. D(2)(b).
[117] Scott M. Farley and Lt Col Richard A. Jaynes, *The Sikes Act Improvement Act of 1997*, ARMY LAW., Mar. 1998, at 37, 39 [hereinafter Farley and Jaynes] (explaining that under the Administrative Procedure Act, courts review and may set aside agency action not taken in accordance with law). *Id.*

Procedure Act (APA)[118] courts may review agency action at the behest of any person[119] "adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[120] and set aside that action[121] if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[122] If, for example, a Department Secretary determined an installation did not have the requisite significant natural resources to trigger the need for an INRMP, an adversely affected party could sue.[123] However, courts traditionally give substantial deference to an agency interpretation if it is reasonable[124] (i.e., what constitutes "significant" natural resources).

B. Mutual Agreement of the Parties to the Plans

The new statutory obligation to complete the plans gives increased meaning to the preexisting provision regarding the relationship among the parties involved in preparing the plans. Like the previous Sikes Act, the SAIA directs the Secretaries of the respective military departments to prepare each plan "in cooperation with the Secretary of the Interior, acting through the Director of the U.S. Fish and Wildlife Service (USFWS), and the head of each appropriate state fish and wildlife agency for the state in which the military installation concerned is located."[125] Another carry-over requirement is that "the resulting plan for the military installation shall reflect the mutual agreement of the parties

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[118] 5 U.S.C.A. § 551.
[119] 5 U.S.C.A. § 551(2) ("Person" includes an individual, partnership, corporation, association, or public or private organization other than a [federal] agency). *Id.*
[120] 5 U.S.C.A. § 702.
[121] 5 U.S.C.A. § 551(13) (agency "action" includes the failure to act). *Id.*
[122] 5 U.S.C.A. § 706.
[123] For a discussion of the standing requirement, *see* Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (holding that the National Wildlife Federation did not have standing under Section 702 of the Administrative Procedures Act to challenge the land withdrawal review program because the actions objected to were not a final agency action) and its progeny.
[124] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (if statute is silent or ambiguous with respect to a specific issue, the agency interpretation will be upheld if it is based on a permissible construction of the statute). *Id.*
[125] Pub. L. No. 105-85, § 2904(a).

concerning conservation, protection, and management of fish and wildlife resources."[126] However, before the SAIA, the Secretary of Defense was only "authorized,"[127] not "required,"[128] to prepare and implement plans. This gave an installation commander discretion to decide not to implement the plan or parts of the plan if faced, for example, with a state agency that did not agree to the plan.[129]

DoD's concern over the language of the SAIA is that, since it makes INRMPs mandatory and retains the requirement for mutual agreement among the parties, installation commanders will believe the state agencies were given "unprecedented authority to 'veto' INRMPs."[130] Commanders may also be intimidated by the fact that a state fish and wildlife agency, failing to reach mutual agreement on the INRMP, can now seek judicial review of the plan.[131] This might pressure commanders to feel compelled to change training schedules and operations "to accommodate natural resources concerns" raised by the state or federal fish and wildlife agencies, despite resulting adverse impacts on mission or training requirements.[132]

Because of DoD's apprehension that the military's autonomy with respect to installation lands would be usurped, the language in the Amendments concerning the relationship with the federal and state agencies was one of the major stumbling blocks during the negotiations.[133] DoD's goal was to ensure that retaining the language calling

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[126] *Id.*
[127] 16 U.S.C.A. § 670a (amended 1997).
[128] Pub. L. No. 105-85, § 2904(a).
[129] Interview with Jim Van Ness, Associate DoD General Counsel for Environment and Installations (Mar. 25, 1998).
[130] DoD Draft Guidance, *supra* note 100.
[131] Farley and Jaynes, supra note 117, at 39. *See* discussion of Administrative Procedure Act *supra* notes 118-124 and accompanying text.
[132] DoD Draft Guidance, *supra* note 100.
[133] *Id.*; *see Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. On Fisheries, Wildlife, and Oceans of the House of Representatives Comm. On Resources*, 104th Cong. (1995) (statement of Ms. Sherri W. Goodman) [hereinafter Goodman, Mar. 16, 1995] (asserting that consultation is the appropriate

for "mutual agreement" did not diminish an installation commander's authority to decide actions necessary to ensure and preserve military preparedness.[134] Confident that it achieved its goal, the DoD drafted guidance after the passage of the 1997 Amendments to reassure installation commanders and their planners that the primary purpose of INRMPs is to "help installation commanders manage natural resources more effectively, so as to ensure the installation lands remain available and in good condition to support the installation's military mission."[135]

Both the language of the statute and the legislative history support DoD's position that the Sikes Act "will enable the military departments to take advantage of the expertise of the [US]FWS and state [agencies]" without jeopardizing "an installation commander's discretion to ensure the preparedness of the Armed Forces."[136] The Amendments point out that nothing in the Title "enlarges or diminishes the responsibility and authority of any state for the protection and management of fish and resident wildlife."[137] Additionally, the amendments require, "to the extent appropriate and applicable," that the plans provide for "no net loss in the capability of military installation lands to support the military mission of the installation."[138] Legislative history from a prior House Bill reveals that this "no net loss" provision was meant to emphasize the primary use of the plans: to enable military commanders to make best use of the "military lands to ensure military

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role for the USFWS and state agencies, and requesting that the phrase 'mutually agreed to by' be replaced with 'developed in consultation with'). *See also, Wildlife Management on Military Installations: Hearing on H.R.374 Before the Subcomm. On Fisheries Conservation, Wildlife and Oceans of the House of Representatives Comm. On Resources*, 105th Cong. (1997) (statement of Ms. Sherri W. Goodman) (reporting no agreement yet on specific language to ensure all parties have an opportunity to participate in plan development). *Id.*

[134] DoD Draft Guidance, *supra* note 100.

[135] *Id.*

[136] *Id.*

[137] Pub. L. No. 105-85, § 2904(a).

[138] Pub. L. No. 105-85, § 2904(c).

preparedness."[139] More recently, less than a month before the SAIA passed, the legislators again addressed DoD's concerns:

> The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the USFWS or the state fish and wildlife agencies in relation to military lands. Moreover, it is expected that INRMPs shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.[140]

In its draft implementing guidance to the military services, the DoD advises military planners to share the entire INRMP with the other agencies, with the goal of reaching mutual agreement as to the entire plan.[141] However, the DoD cautions that mutual agreement is only *required* with respect to those elements of the plan within the scope of the agencies' authority "derived from a source other than the Sikes Act, such as the Endangered Species Act."[142] Therefore, if the USFWS or a state fish and wildlife agency does not agree with part of the INRMP clearly not within the scope of the particular agency's authority,[143] the installation commander may finalize the plan over their objections and "proceed to manage its natural resources in accordance with the terms of the plan."[144]

C. The National Environmental Policy Act and the Sikes Act Requirement for Public Comment

In addition to requiring consultation with the USFWS and the appropriate state agency, the 1997 Amendments require the Secretary of each military department to "provide an opportunity for the submission of public comments" on the preparation of

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[139] H.R. CONF. REP. NO. 103-718, at 8 (1994).
[140] H.R. CONF. REP. NO. 105-340, at 870 (1997).
[141] DoD Draft Guidance, *supra* note 100.
[142] *Id.*
[143] *Id.* (expressing the opinion that this situation is not expected to occur often, highlighting the finite role to be played by the federal and state fish and wildlife agencies and reflecting the historically cooperative relationship among the agencies). *Id.*

INRMPs.[145] Because this provision is similar to requirements found in the National Environmental Policy Act (NEPA),[146] the question fairly raised by this language is whether NEPA applies to the preparation and implementation of INRMPs. The answer to this question is significant not only because of the litigation risk involved in running afoul of NEPA, but also because NEPA compliance may or may not suffice to meet the isolated requirement for public comment in the Sikes Act Amendments. To determine the applicability of NEPA to INRMP preparation and implementation, one must first understand the statutory and regulatory requirements of NEPA.

1. NEPA Background

NEPA was passed in 1970, and touted, at least publicly, by President Nixon as "the herald of a new environmental era."[147] NEPA contains lofty goals, calling on the Federal government to "use all practicable means . . . to improve and coordinate Federal plans, programs, and resources" to allow the nation to:

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

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[144] *Id.*

[145] Pub. L. No. 105-85, § 2905(d). *Compare Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 188 (1993) (H.R. 3300 § 4(c)) *with* Pub. L. No. 105-85, §2905(d) (public comment provision first appeard in H.R. 3300 and remained in tact throughout the several bills preceding the 1997 enactment of the SAIA, except "Secretary of Defense" became "Secretary of each military department").

[146] 42 U.S.C.A. §4321. *See* 40 C.F.R. § 1506.6 (calling for agencies to solicit public comments at various stages of preparing environmental documentation). *Id.*

[147] GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 333 (3rd ed. 1993) [hereinafter COGGINS]. According to the authors, Nixon thought NEPA was "little more than an innocuous statement of policy." *Id.* For a discussion on how the impact of NEPA was also underestimated by businesses, development interests, and public bureaucracies, *see* Lynton K. Caldwell, *A Constitutional Law for the Environment, 20 Years with NEPA Indicates the Need*, 31 ENV'T 6, 26-28 (1989) [hereinafter Caldwell].

> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[148]

This language is buttressed by a subsequent section which states, "Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . ."[149] This seems to direct agencies[150] to integrate the broad policy goals of NEPA into agency action.

The Supreme Court, however, has determined that the requirements of NEPA are procedural, not substantive. In *Robertson v. Methow Valley Citizens Council*[151] the Court held, "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[152] The Court went on to say that whereas "[o]ther statutes may impose substantive environmental obligations on federal agencies . . . NEPA merely prohibits uninformed – rather than unwise – agency action."[153] Although the Court did not ignore what it called the "sweeping policy goals"[154] of NEPA, it nonetheless relegated them to the position of "strong precatory language."[155] The purpose of NEPA, as carved out judicially, is to help ensure the agency makes a well-informed decision.[156] Its purpose

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[148] 42 U.S.C.A. §4331(b).
[149] 42 U.S.C.A. §4332.
[150] *See* 40 C.F.R. § 1508.12 (defining "federal agency" to include all agencies of the Federal government; excluding Congress, the Judiciary, and the President, including the performance of staff functions for the President in his Executive Office). *Id.*
[151] 490 U.S. 332 (1989).
[152] *Id.*
[153] *Id.* at 351.
[154] *Id.* at 350.
[155] *Id.* at 349.
[156] *See generally* COGGINS, *supra* note 147, at 361(opining that the Supreme Court "has taken the narrow view of every NEPA question it has chosen to decide"); Caldwell, *supra* note 147, at 26 (deeming the failure

is not to mandate – or even to review whether an agency should have made – one decision over another.

The imposition of NEPA, then, is not in directing an outcome, but in requiring an agency to carry out a process.[157] As phrased by the Council on Environmental Quality (CEQ),[158] NEPA "provides a mandate and a framework for federal agencies to consider all reasonably foreseeable environmental effects of their actions."[159] As one author described, "This was a departure from the historic practice of governmental agencies deciding first what they wanted to do and then planning . . . how to do it without regard to the possible, unforeseen consequences."[160] NEPA's "framework" takes the form of 'action-forcing' procedures,[161] requiring all agencies of the Federal Government to:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[162]

This statutory language provides the basis upon which implementing guidance has been

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to enforce the policy of NEPA as well as the process a "critical error in the interpretation of both NEPA and the Environmental Impact Statement"). *Id.*

[157] See COGGINS, *supra* note 147, at 361 ("In spite of the Court's reluctance to allow the tail of environmental evaluation to wag the dog of normal government operations, NEPA remains a critical element in public land management."). *Id. But see* Caldwell, *supra* note 147, at 26 (describing how environmental impact statements have been perverted to support agency activities that, if NEPA's intent were honored, would have been rejected; giving as examples the Alaska oil pipeline, and the Tennessee-Tombigbee Canal). *Id.*

[158] CEQ is the implementing agency for NEPA. *See infra* notes 163-164 and accompanying text.

[159] COUNCIL ON ENVIRONMENTAL QUALITY, INCORPORATING BIODIVERSITY CONSIDERATIONS INTO ENVIRONMENTAL IMPACT ANALYSIS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT vii (1993).

[160] Caldwell, *supra* note 147, at 26.

[161] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[162] 42 U.S.C.A. § 4332(2)(C).

built. The Council on Environmental Quality (CEQ), established by NEPA[163] and responsible for "ensuring that federal agencies meet their obligations under Act," [164] has provided implementing guidance in the form of regulations.[165] Further implementation is done at the agency level.[166] Accordingly, the DoD and the military departments have promulgated regulations implementing NEPA[167] that are approved by CEQ.[168] In the event of a conflict between an agency's regulations and the CEQ regulations, the latter normally take precedence.[169]

The statute and the regulations collectively guide an agency through the NEPA process.[170] The basic procedure of NEPA is that if proposed agency action is a major federal action significantly affecting the quality of the human environment, then an environmental impact statement (EIS) must be prepared.[171] Essentially, the contents of an EIS are those items outlined by the statute, quoted above.[172] In its broadest sense, the EIS "induces an ecological rationality that modifies and may even negate the economic

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[163] 42 U.S.C.A. § 4342.
[164] *CEQ Homepage* (visited Apr. 6, 1998) < http://www.whitehouse.gov/CEQ/About.html>; *see also* 40 C.F.R. § 1515.2 (delineating the Council's primary responsibilities and underlying authority).
[165] 40 CFR § 1500, 48 Fed. Reg. 34263 (1983).
[166] 40 C.F.R. § 1507.3 (requiring agencies to adopt their own procedures in consultation with CEQ). *Id.*
[167] 32 C.F.R. § 188, encl. 1 (Environmental Effects in the United States of DoD Actions); 32 C.F.R. § 651 (Environmental Effects of Army Actions) (1997); 32 C.F.R. § 775 (Navy Procedures for Implementing the National Environmental Policy Act) (1997); 32 C.F.R. §989 (Air Force Environmental Impact Analysis Process (EIAP)) (1997).
[168] 40 C.F.R. § 1507.3.
[169] 40 C.F.R. § 1507.3 (calling for agency procedures to comply with [CEQ] regulations unless compliance would be inconsistent with statutory requirements). *Id.*
[170] Additionally, CEQ periodically publishes guidance documents which, although not legally binding, address specific topics and are designed to assist agencies' efforts to fully comply with NEPA (e.g., CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), and INCORPORATING BIODIVERSITY CONSIDERATIONS INTO ENVIRONMENTAL IMPACT ANALYSIS UNDER NEPA (1993)).
[171] 42 U.S.C.A. § 4332. *See* 40 C.F.R. § 1501.4.
[172] *Supra* note 162 and accompanying text. *See generally* 40 C.F.R. § 1502.1 through § 1502.25; *Id.* at § 1502.10 (requiring agencies to use a standard format which includes a statement of purpose and need for the action, alternatives to the action, and environmental consequences). *Id.*

assumptions that have traditionally underlain proposals with environmental impacts."[173]

If the agency has insufficient information to determine whether or not the action is major or significantly affects the quality of the human environment, it must prepare an environmental assessment (EA)[174] to determine whether the environmental impacts rise to the level to trigger the need for an EIS.[175] If the EA reveals that the impacts are not significant, the agency must prepare a finding of no significant impact (FONSI).[176] Even if an EA reveals significant impacts, an agency may include in its analysis a plan to employ mitigation measures[177] to minimize those effects, and then publish a FONSI.[178]

As opposed to focusing on a particular action, an agency may identify ahead of time a category of actions "which do not individually or cumulatively have a significant effect on the human environment."[179] This category of actions, called categorical exclusions (CATEXs) requires neither an environmental assessment nor an environmental impact statement.[180] In a "recapture" provision, however, the CEQ regulations require that agencies adopt procedures by which a normally excluded action, that does in fact

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[173] Caldwell, *supra* note 147, at 26.
[174] 40 C.F.R. § 1508.9 (explaining an EA is a more concise public document that briefly describes the need for the proposal; the action and its alternatives, along with their environmental impacts; and lists agencies and people consulted). *Id.*
[175] 40 C.F.R. § 1501.4.
[176] *Id. See also* 40 C.F.R. §1508.13 (defining FONSI).
[177] 40 C.F.R. § 1508.20 (defining Mitigation to include:

(a) Avoiding the impact altogether by not taking certain action or parts of an action.
(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or environments.).
Id.

[178] COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 19 (1997) [hereinafter NEPA AFTER 25 YEARS] (identifying an increasing trend for agencies to propose mitigation measures during the preparation of EAs). *Id.*
[179] 40 C.F.R. §1508.4.
[180] *Id.*

have a significant environmental effect, will be subject to the procedural requirements of NEPA.[181] Each of the military departments have identified various CATEXs in their regulations implementing NEPA.[182]

The process of preparing and coordinating an EA, and even more so an EIS, can be very complex, costly, and time intensive.[183] As a result, the questions of whether NEPA applies to INRMPs, and, if so, what process under NEPA is appropriate, become important ones, as the DoD is faced with statutory deadlines for completing all INRMPs[184] and operates with a limited budget for preparing and implementing the plans.[185]

2. NEPA and INRMPs

The focus of the procedural mandates of NEPA is on "proposals for major[186] federal actions significantly affecting the quality of the human environment."[187] The overarching question of whether an INRMP triggers NEPA's procedural requirements must be answered by the agency concerned.[188] A decision by an agency that NEPA does not apply to a proposed federal action is subject to judicial review under the

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[181] *Id.* (section also allows an agency to prepare environmental assessments even though it is not required to do so). *Id.*

[182] 32 C.F.R. § 651 Appendix A (Army); 32 C.F.R. § 775.6(f) (Navy); 32 C.F.R. § 989 Attachment 2 (Air Force).

[183] COGGINS, *supra* note 147, at 361.

[184] Pub. Law 105-85 § 2905(c) (setting deadline of 17 Nov 2001 for INRMPs to be implemented on each military installation where such plan is required). *Id.*

[185] For a discussion of funding and budget issues, *see infra* notes 291-330 and accompanying text.

[186] 40 C.F.R. §1508.18 (clarifying that the term Major "reinforces but does not have a meaning independent of [the term] significantly"). *Id.*

[187] 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. 1502.3. *See also* 40 C.F.R. § 1508.23 (defining "proposals"); 40 C.F.R. § 1508.18 (defining "major federal action"); 40 C.F.R. § 1508.27 (defining "significantly"); 40 C.F.R. § 1508.3 and 1508.8 (defining "affecting"); 40 C.F.R. § 1508.14 (defining "the quality of the human environment").

[188] 42 U.S.C.A. § 4332(2)(C); *see* RESTORE: The North Woods v. U.S. Dept. of Agriculture, 968 F.Supp. 168, 171. (D. Vermont 1997).

Administrative Procedure Act.[189] Circuit courts are split, however, as to what standard of review is appropriate.[190] Some courts[191] use the arbitrary and capricious standard,[192] and others[193] use the less deferential standard of reasonableness.[194]

Courts have recognized several instances where an agency determination that NEPA does not apply will be upheld. These include agency action that was completed before the passage of NEPA,[195] situations where 'provisions in other statutes expressly exempt certain activities from requiring preparation of an impact statement,'[196] situations where an agency's enabling statute has a 'clear and fundamental conflict' with NEPA,[197] agency actions that are purely ministerial and non-discretionary,[198] and actions where there is minimal federal involvement.[199] None of these, however, seem to apply to INRMPs. Plans completed before NEPA passed would include cooperative plans accomplished pursuant to the 1960 Act. These are, nevertheless, subject to periodic

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[189] 5 U.S.C.A. § 551. *See supra* notes 118-124 and accompanying text.

[190] *See* Northcoast Environmental Center v. Glickman, 136 F.3d 660, 666-667 (9th Cir. 1997) (discussing split among Circuit courts applying Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989)). *Id.* The *Northcoast* court distinguishes between a factual or technical matter, in which an agency is accorded a "strong level of deference," and "disputes involving predominantly legal questions," to which the less deferential standard of 'reasonableness' applies, *see id.* at 667.

[191] *See Northcoast*, 136 F.3d at 667 (describing 11th Circuit's adoption of "the arbitrary and capricious standard when reviewing agency action in NEPA cases"). *Id.*

[192] 5 U.S.C.A. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). *Id.* See *Northcoast*, 136 F.3d at 666 (explaining that under arbitrary and capricious standard, it will only overturn agency decision only if agency committed a 'clear error of judgement'). *Id.*

[193] *See Northcoast*, 136 F.3d at 666-667 (joining the 8th and 10th Circuits in limiting *Marsh*, 490 U.S. 360 (1989) as not controlling "when dealing with the threshold question of NEPA applicability in the first instance."). *Id.*

[194] *See id.* at 666 (agency decision to be upheld unless it was unreasonable) (citing Friends of the Earth v. Hintz, 800 F. 2d 822, 836 (9th Cir. 1986)).

[195] The Fund For Animals v. The United States of America, Civ No. 96-0040 MV/DJS, slip op. at 8 (D. N.M. Oct. 23, 1996).

[196] Melaney Payne, Casenote, *Critically Acclaimed But Not Critically Followed – The Inapplicability of the National Environmental Policy Act to Federal Agency Actions*: Douglas County v. Babbitt, 7 VILL. ENVTL. L.J. 339, n.5 (1996) [hereinafter Payne] (quoting Howard Geneslaw, Article, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 J. Land Use & Envtl. L. 127, 136-138 (1994)).

[197] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 791.

[198] RESTORE: The North Woods v. U.S. Dept. of Agriculture, 968 F. Supp. 168, 175 (D. Vermont 1997).

review and alteration.[200] Any such review taking place after 1970 could not escape NEPA analysis merely because the plan originated before the passage of NEPA.[201]

Concerning INRMPs and environmental planning generally, legislation applicable to the DoD and the military departments does not conflict substantively with the requirements of NEPA.[202] Furthermore, the actions taken to prepare and implement INRMPs do not seem "ministerial and non-discretionary."[203] To the contrary, INRMPs consider alternatives and establish priorities among ecosystem management objectives.[204] Similarly, the proposition that an INRMP constitutes action characterized by minimal federal involvement is not compelling.[205] The CEQ regulations include as an example of federal action, "adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon

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[199] *RESTORE*, 968 F. Supp. at 175.

[200] See 16 U.S.C.A. § 670a(b)(2) (amended 1997) (Sikes Act of 1960 called for plans to be "reviewed as to operation and effect by the parties thereto on a regular basis, but not less often than every 5 years") *Id.*; DoDI 4715.3, *supra* note 11, at para. F(1)(f) (DoD guidance on INRMPs that predated the 1997 Amendments called for the plans to be reviewed annually, updated as warranted by mission or environmental changes, and revised and approved at least every 5 years.); Pub. L. 105-85 § 2904(c)(2) (SAIA retained language from previous Act calling for review at least every 5 years).

[201] The Fund For Animals v. The United States of America, Civ No. 96-0040 MV/DJS, slip op. at 9 (D. N.M. Oct. 23, 1996) (project begun or planned prior to NEPA, if uncompleted, subject to NEPA as to the portions remaining; as long as agency decisions remain to be made or are open to revision, NEPA applies). *Id.* *See* 40 C.F.R. § 1506.12 ("These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date."). *Id.*

[202] Numerous statutes and Executive orders (EOs) compel the military to pay particular attention to the environment. *See, e.g.*, 16 U.S.C.A. 1361 (Marine Mammal Protection); 16 U.S.C.A. 1431 (Marine Protection, Research and Sanctuaries Act of 1972); 16 U.S.C.A. 1451 (Coastal Zone Management Act); 16 U.S.C.A. 1531 (Endangered Species Act of 1973); 16 U.S.C.A. 3501 (Coastal Barrier Resources Act); EO 11593, "Protection and Enhancement of the Cultural Environment," May 13, 1971; EO 11644, "Use of Off-Road Vehicles on the Public Lands," February 8, 1972; EO 11988, "Floodplain Management," May 24, 1977; EO 11989, "Off-Road Vehicles on Public Lands," May 24, 1977; EO 11990, "Protection of Wetlands," 24 May 1977; EO 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994; EO 12962, "Recreational Fisheries," June 7, 1995.

[203] *RESTORE*, 968 F. Supp. at 172.

[204] DODI 4715.3, *supra* note 11, at encl. 6(b)(5).

[205] *See* DODI 4715.3, *supra* note 11, at para. D(1)(m) (describing the management and conservation of natural resources under DoD control, "including planning, implementation, and enforcement functions," as "inherently governmental functions"). *Id.*

which future agency actions will be based."[206] Like the plans described by CEQ, INRMPs contain "information needed to make appropriate decisions about natural resources management" on federal lands.[207] Clearly the adoption of an INRMP is "federal action" under NEPA.

An examination of the SAIA and its legislative history reveals no indication that Congress intended to exempt the military from the requirements of NEPA in preparing and implementing INRMPs. The Sikes Act Amendments, which constitute the statutory requirement for completing INRMPs, seem at least cognizant, if not inviting, of the NEPA process. The 1997 Amendments give the military almost four years to complete all required plans,[208] arguably enough time to conduct the NEPA process, and require that the public be given an opportunity to comment on the plans, which is reminiscent of NEPA's public comment provisions.[209]

The only other "exclusion" from the requirements of NEPA is for activities covered by agency CATEXs. A review of the military departments' NEPA regulations reveals that only the Navy lists as exclusions activities that might be undertaken pursuant to a natural resources management plan.[210] The Navy CATEXs are currently under

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[206] 40 C.F.R. § 1508.18(b)(2).
[207] DODI 4715.3, *supra* note 11, at para. D(2)(b).
[208] Pub. L. No. 105-85, § 2905(c) (giving the Secretaries of the military departments until 17 November 2001 to prepare and begin implementing INRMPs on each applicable installation). *Id.*
[209] Pub. L. No. 105-85, § 2905(d). For a discussion of the public comment requirement under the SAIA, *see infra* notes 239-271 and accompanying text.
[210] 32 C.F.R. § 775.6 (The Navy CATEXs include:

> (30) Natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulations by federal, state, or local organizations having management responsibility and authority over the natural resources in question, including hunting or fishing during hunting or fishing seasons established by state authorities pursuant to their state fish and game management laws. . . .
> (31) Approval of recreational activities which do not involve significant physical alteration of the environment or increase human disturbance in sensitive natural habitats and which do not occur in or adjacent to areas inhabited by endangered or threatened species.

revision, however. Draft Navy policy indicates that some will be rescinded and others will be changed to include language that the activity can only be categorically excluded if the "underlying land management decisions have been analyzed by an EA or EIS."[211] It is presently unclear what, if any, of the actions taken by the Navy pursuant to an INRMP could be categorically excluded from the requirements of NEPA.

If the military departments are not excused from complying with NEPA in preparing and implementing INRMPs, they must determine what process under NEPA is appropriate. The focus becomes whether the agency action "significantly affects" the quality of the human environment. "Human environment" is defined comprehensively to include "the natural and physical environment and the relationship of people with that environment."[212] This CEQ regulatory guidance is mirrored by DoD's language in describing ecosystem management, the basis for INRMPs.[213] Clearly, the ecosystem management activities undertaken by military departments to fulfill the Sikes Act requirements of preparing and implementing INRMPs will affect the human environment.

The more difficult determination concerns the term "significantly," which is dispositive as to whether an EIS is required or if an EA and FONSI are sufficient.

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(32) Routine maintenance of timber stands, including issuance of downwood firewood permits, hazardous tree removal, and sanitation salvage.
(33) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved.). *Id.*

[211] Draft Secretary of the Navy Instruction (SECNAVINST) 5090.6A, encl. 1, Policies and Responsibilities for Implementation of the National Environmental Policy Act Within the Department of the Navy (on file with author) (CATEX 30: added "where underlying land management decisions have been analyzed in an EA or EIS" after "established by state authorities pursuant to their state fish and game management laws"; CATEX 31: deleted; CATEX 32: changed to read, "Management of timber stands, including issuance of down-wood firewood permits, hazardous tree removal, sanitation salvage, controlled burns and harvesting of pine straw and Christmas trees, where underlying land management decision have been analyzed in an EA or EIS.") *Id.*

[212] 40 C.F.R. § 1508.14.

[213] DoDI 4715.3, *supra* note 11, at encl. 3, para 9 (defining "ecosystem management" as "a process that considers the environment as a complex system functioning as a whole, not as a collection of parts, and

"Significantly" is defined by CEQ in terms of "context" and "intensity."[214] Depending on the setting of the proposed action, context can include the impact on society as a whole, the affected region, or the locality involved.[215] Since an INRMP is site-specific to a given installation, its significance would most likely be evaluated based on its long- and short-term effects only in the location to which it applies.[216]

Intensity refers to the "severity of impact"[217] and includes considerations of both beneficial and adverse impacts;[218] unique geographical characteristics;[219] "the degree to which the action may establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration;"[220] and "the degree to which the action may adversely affect an endangered or threatened species or its habitat" as determined under the Endangered Species Act.[221] Depending on the natural resources management activities called for by a given INRMP, it may have a significant effect based on intensity. Many installations, for example, have unique characteristics in terms of ecosystems represented or cultural resources present.[222] Additionally, some installations are home to endangered or threatened species and contain critical habitat.[223] Furthermore, INRMPs can be said to "establish a precedent for future actions" in that they are 5-year plans.

Given the requirements of NEPA, the definitions found in CEQ's implementing

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recognizes that people and their social and economic needs are a part of the whole"). *Id.*
[214] 40 C.F.R. § 1508.27.
[215] 40 C.F.R. § 1508.27(a).
[216] *Id.*
[217] 40 C.F.R. § 1508.27(b).
[218] 40 C.F.R. § 1508.27(b)(1) (a significant effect may exist even if, overall, the effect will most likely be beneficial). *Id.*
[219] 40 C.F.R. § 1508.27(b)(3) (including "proximity to historic or cultural resources . . . wetlands, wild and scenic rivers, or ecologically critical areas"). *Id.*
[220] 40 C.F.R. § 1508.27(b)(6).
[221] 40 C.F.R. § 1508.27(b)(9).
[222] *See* discussion *supra* notes 12-17 and accompanying text.

regulations, and the potential impact of INRMPs, it seems clear that many INRMPs will trigger the NEPA process. Although the 1996 DoD Instruction that mandated preparation of INRMPs was silent as to whether or how NEPA applied, other DoD regulations, which implement NEPA, are on point.[224] DoD's general proposition is that "when a proposal is not one that normally requires an [EIS] and does not qualify for categorical exclusion, the DoD Component shall prepare an [EA]."[225] The DoD offers a non-exhaustive list of considerations as to whether an activity is one which normally requires an EIS. These include whether the action has the potential to: cause significant degradation of environmental quality; present a threat or hazard to the public; or result in a significant impact on protected natural or historic resources.[226] INRMPs, intended as a tool to improve environmental stewardship, do not seem to present this harmful potential. Therefore, it is reasonable to conclude that an EA would be the most efficient way of first documenting a proposed INRMP. An EA includes a discussion of the need for the proposed agency action, alternatives to the action, and the environmental impacts of the proposed action and the alternatives,[227] and is followed by either an EIS or a FONSI.[228]

Before the passage of the 1997 Sikes Act Amendments, the military departments promulgated guidance on INRMPs, which, to some extent, also addressed NEPA compliance.[229] For the Air Force and the Army, the pre-existing guidance is still in effect, pending approval of draft policy guidance incorporating the new requirements of the SAIA. Since the passage of the Amendments, the Navy has finalized its policy guidance

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[223] *See supra* note 12 and accompanying text.
[224] 32 C.F.R. § 188, encl. 1.
[225] *Id.*
[226] *Id.*
[227] 40 C.F.R. § 1508.9.
[228] *Id.*
[229] *See supra* notes 87-91 and accompanying text.

concerning the review of INRMPs under NEPA.[230]

The current Army guidance details how the implementation of INRMPs will comply with NEPA. As early as 1988, the Army published general NEPA guidance that the development of natural resources management plans normally requires the preparation of at least an EA.[231] Later, in guidance specific to INRMPs, the Army required that INRMPs receive "appropriate environmental review according to NEPA . . . prior to implementation of the plan's objectives."[232] At that time, the Army announced that the appropriate level of environmental documentation would be determined on an "installation by installation basis," considering impacts on "endangered species, wildlife, riparian zones, floodplains, wetlands, archeological and historic sites, off-road vehicle use, sedimentation erosion, timber harvesting, and non-point source pollution."[233] The Army published additional guidance several months before the 1997 Amendments passed, reiterating that its plans will comply with NEPA:

> INRMPs shall comply with NEPA process requirements specified in AR 200-2.[234] The NEPA process is a decision-making tool that ensures coordinated planning and identifies and discloses environmental impacts to both the decision-maker and the public. Implementation of the INRMP shall serve as the proposed action and NEPA documentation should be scoped to address appropriate alternatives and issues.[235]

Similar to the Army guidance, Navy policy is that "Documentation under NEPA is

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[230] Memorandum for the Vice Chief of Naval Operations and the Assistant Commandant of the Marine Corps, Subject: "Department of the Navy Environmental Policy Memorandum 98-06; Review of Integrated Natural Resources Management Plans Under the National Environmental Policy Act" (Aug. 12, 1998) (on file with author) [hereinafter Navy Policy].
[231] Army Regulation (AR) 200-2, Environmental Effects of Army Actions, at para. 5-3(k) (Dec. 23, 1988) [hereinafter AR 200-2].
[232] AR 200-3, *supra* note 87, at para. 2-2(a).
[233] *Id.*
[234] *Supra* note 231.
[235] Army Guidance, *supra* note 87, at para. 8(d).

required before approval of all new or newly revised INRMPs."[236] The Navy recognizes an EA may suffice unless projects in the INRMP will have a significant environmental impact, triggering the need for an EIS.[237] In contrast to the Army and Navy, the Air Force has little in the way of specific NEPA guidance as to preparing and implementing INRMPs. The Air Force Instruction simply states, "The implementation of an INRMP may constitute a potentially significant federal action . . . [and] may require consideration of potential environmental effects" under the NEPA process.[238]

3. NEPA, INRMPs and the Sikes Act

Since each military department has at least some existing guidance on the application of NEPA to INRMPs, the question becomes whether the SAIA levies new or different requirements that will alter how the services conduct the process. The issue of NEPA compliance concerning INRMPs has recently come to the forefront because of the separate requirement in the Sikes Act Amendments for public comment on INRMPs.[239] While not mentioning NEPA, the 1997 Amendments specifically require an opportunity for the submission of public comments on (1) INRMPs undertaken pursuant to the 1997 Amendments, and (2) INRMPs that result from negotiations with the USFWS and the appropriate state agencies to convert a cooperative plan, existing before the Sikes Act Amendments, into an INRMP.[240]

The significance of the public comment provision is that it removes the military departments' discretion to determine when public participation is appropriate. Unlike

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[236] Navy Policy, *supra* note 230.
[237] *Id.*
[238] AFI 32-7064, *supra* note 88, at para. 2.4.
[239] Pub. L. No. 105-85, § 2905(d). *See also* Navy Policy, *supra* note 230 (pointing out another reason for the recent emphasis on NEPA applicability is that "an INRMP is no longer a notional document . . . [but] is now a legislatively required document that must be implemented"). *Id.*
[240] Pub. L. No. 105-85, § 2905.

NEPA, it applies regardless of the environmental effect of an INRMP. Furthermore, this pervasive requirement is a potential basis for litigation. Under the APA, courts may set aside agency action "taken without adherence to all of the procedures required by law."[241] This opens the courthouse door to a plaintiff alleging an INRMP was completed without allowing adequate opportunity for public comment. It is unclear what the remedy would be, but the courts could impose an injunction against implementing the plan until the requisite public comment was accomplished.[242] Given the potential impact of the provision, it received surprisingly little attention during the negotiation over the language of the various bills.

Although the public comment provision was present as early as 1993, in the first bill proposed to reauthorize the Sikes Act,[243] the legislative history is largely devoid of an explanation of the purpose of language. Seemingly, however, it was embraced early on by the DoD. In a 1994 hearing on House Bill 3300, Ms. Goodman testified that the DoD "generally supports a number of amendments that would complement development and implementation of integrated plans, including public participation in the preparation of each."[244] She echoed this sentiment in her statement concerning House Bill 1141 in 1995,[245] and nothing indicates the DoD changed its position before the SAIA was passed in 1997.

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[241] Farley and Jaynes, *supra* note 117, at 39.
[242] *See* State of Utah v. Babbitt, 137 F.3d 1193, 1212 (10th Cir. 1998) (discussing that if defendants amended a land use plan without the public participation required under the Federal Land Policy and Management Act of 1976, plaintiffs could challenge the plan at that time, would be entitled to relief, and the appropriate remedy would be to enjoin the use of the plan). *Id.*
March 3, 1998.
[243] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 188 (1993) (H.R. 3300 § 4(c)).
[244] Goodman, June 29, 1994, *supra* note 9.
[245] Goodman, Mar. 16, 1995, *supra* note 133.

Cognizant of the public comment requirement, but reluctant to dictate procedural details, the DoD, in its draft guidance for implementing the 1997 Amendments, leaves it to the discretion of the military departments as to how to meet the new public comment requirement.[246] Specifically, the DoD draft guidance allows:

> The NEPA process can document the decision-making process for INRMP preparation and implementation in a detailed, thorough administrative record. It is to the discretion of each Military Department as to whether the NEPA process [is] used to fulfill this requirement. Alternative provisions to solicit and evaluate public comments (e.g., notices in the local media, public meetings) should be developed if the NEPA process is not used. These provisions should be clearly and explicitly stated, and should ensure that all potentially interested parties have an opportunity to comment on the INRMP.[247]

Each of the military departments has drafted guidance to incorporate the SAIA requirements and DoD guidance into their policy and procedures.[248] The Navy policy has been finalized.[249] The Air Force draft guidance, while noting that DoD draft guidance does not require the NEPA process be used to meet the public comment requirement, states that "performing an EA may be the appropriate means to ensure public comment while simultaneously streamlining the implementation of the specific actions in the plan."[250] Although it doesn't constitute formal guidance, in a recent article the Army noted the SAIA public comment requirement and articulated the rationale that an EA followed by a FONSI is normally the appropriate course of action because, usually,

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[246] DoD Draft Guidance, *supra* note 100.
[247] *Id. Cf.* Memorandum from Department of the Army, Office of the Assistant Secretary for Installations, Logistics, and Environment, to Deputy Under Secretary of Defense (Environmental Security) (May 29, 1998) (on file with author) (in response to DoD draft guidance, suggested the language be strengthened to say, "The NEPA process *should* be used to document the decision making process..." for INRMPs (emphasis added)).
[248] Note that the most recent Army guidance available predates the SAIA, *see supra* note 87.
[249] Navy Policy, *supra* note 230.
[250] Air Force Draft Guidance, *supra* note 107, at 17.

"INRMPs are derived to maintain and to sustain natural resources."[251] The authors pointed out, however, that if "implementation of the INRMP will significantly impact the environment, the installation must produce an EIS."[252]

Navy guidance, finalized after the 1997 Amendments, is more directive than that of the Army and Air Force. The Navy, more clearly than the other departments, has shifted its focus to the preparation of INRMPs in relation to the requirements under NEPA. The policy states:

> Documentation under NEPA is required before approval of all new or newly revised INRMPs. Under normal circumstances, an [EA], concluding in a [FONSI], will suffice. However, if the goals, objectives, methodologies (processes to achieve objectives) or specified projects identified in a draft INRMP will have a significant environmental impact, an [EIS] is required. An INRMP and an EA or EIS may be prepared and processed as one document . . . [or] separately.[253]

The last quoted sentence provides authorization for the Marine Corps to implement, as it requested, a practice of developing the INRMP as the NEPA document.[254]

It appears from the existing and draft guidance that the military will use the NEPA process to prepare and implement INRMPs. The follow-up question is whether the NEPA process, involving either an EIS or EA/FONSI, will satisfy the separate Sikes Act public comment requirement. Since the public comment requirement refers to the development of plans, NEPA will only suffice if it is invoked during the preparation of INRMPs. Assuming that it is, the next step is to examine the public participation fostered by NEPA.

Public involvement under NEPA is extensive.[255] Generally, CEQ regulations

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[251] Farley and Jaynes, *supra* note 117, at 39 n.38.
[252] *Id.*
[253] Navy Policy, *supra* note 230.
[254] Interview with Jennifer L. Scarborough, Natural Resource Specialist, Headquarters, United States Marine Corps, Va. (June 29, 1998)
[255] *See* 40 C.F.R. § 1506.6 (Public Involvement); 40 C.F.R. § 1506.10 (Timing of Agency Action); 40 C.F.R. § 1507.3 (Agency Procedures).

require agencies to "provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons . . . who may be interested or affected."[256] For actions with effects "primarily of local concern," which arguably include an INRMP on a given military installation, CEQ allows public notice to be made through local newspapers or the media, direct mailings, newsletters, posting of notices on and off site in the area, and other similar means.[257]

Under NEPA, the public comment procedures may be different depending on whether an agency completes an EIS or an EA. Whereas the procedures for involving the public during the EIS process are well-defined and comprehensive,[258] NEPA largely allows agencies to determine the extent to which they involve the public during the production of an EA and FONSI.[259] CEQ regulations do, however, require agencies to inform the affected public of a FONSI.[260] The CEQ regulations also specify circumstances under which the agency "shall make the FONSI available for public review . . . for thirty days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin."[261] These include situations where the proposed action is similar to one normally requiring an EIS, and where the nature of the proposed action is "without precedent."[262] It is unclear whether INRMPs will invoke this review period. This determination will have to be made by the

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[256] 40 C.F.R. § 1506.6.
[257] *Id.*
[258] *See generally* 40 C.F.R. § 1503 (Commenting).
[259] NEPA AFTER 25 YEARS, *supra* note 178, at 20 (indicating there is a great deal of confusion about what public involvement is required, appropriate, or allowed in the preparation of EAs, because the NEPA regulations and guidance are primarily oriented to the preparation of EISs). *Id. See id.* (noting some agencies fail to successfully incorporate public participation into their EA/FONSI procedures). *See also id.* at 19 (identifying the preparation of an EA as the most common source of litigation under NEPA because members of the public perceive they are being kept from participating in the process). *Id.*
[260] 40 C.F.R. § 1501.4(e).
[261] *Id.*
[262] *Id.*

military departments on an installation by installation basis.

The military procedures for public involvement on EAs vary by service. The Army regulations call for public involvement in the preparation of EAs "whenever appropriate."[263] The factors the Army considers when determining the extent of public involvement are the:

(1) Magnitude of the proposed project/action;
(2) Extent of anticipated public interest;
(3) Urgency of the proposal; and
(4) Any relevant questions of national security classification.[264]

Additionally, Army regulations require that any documents incorporated into the EA or FONSI by reference be available for public review.[265] Air Force NEPA regulations also call for public involvement on EAs and FONSIs.[266] The extent of public involvement varies depending on the magnitude of the proposed action and its potential for controversy.[267] The Air Force added to CEQ's list of situations requiring the EA and draft FONSI be made available for public review, proposed actions that would be located in a floodplain or wetland, and actions mitigated to insignificance in the FONSI.[268] Either or both of these could subject a given INRMP to the 30-day review requirement. The Navy regulations contain similar language to the other services concerning the factors to consider to determine the extent of public participation.[269] In its supplemental guidance to CEQ regulations on public participation for EAs, the Navy encourages its commands to "develop a plan to ensure appropriate communication with affected and interested

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[263] 32 C.F.R. § 651.35(c).
[264] 32 C.F.R. § 651.25.
[265] 32 C.F.R. § 651.26.
[266] 32 C.F.R. § 989.15(e).
[267] *Id.*
[268] *Id.*
[269] 32 C.F.R. § 775.11 (listing as factors: the magnitude of the environmental considerations associated with the proposed action; the extent of anticipated public interest; and any relevant questions of national security

parties."[270]

It appears, based on CEQ and agency guidance, future INRMPs developed using the NEPA process, via either an EIS or an EA/FONSI, will meet the obligatory public comment requirement under the Sikes Act. If, however, the preparation of an INRMP does not trigger either an EA or an EIS under NEPA, the military departments must nonetheless allow for public comment to comply with the Sikes Act.[271] To be prepared for such a situation, the military departments will need to develop some implementing guidance providing for new stand-alone public comment procedures.

4. Previously Existing Plans and the Public Comment Requirement

Two categories of plans, already in effect at military installations when the SAIA passed, raise unique issues, not the least of which is how to comply with the new public comment requirement. The first category is cooperative plans that must be renegotiated to convert them into INRMPs. The second is INRMPs created in anticipation of the Sikes Act Amendments via DoD and service guidance. The issues are complicated because the language of the statute, the legislative history, and the draft DoD implementing guidance are somewhat contradictory.

Plans in the first category are specifically addressed in the 1997Amendments.[272] The Amendments state that for an installation with a cooperative plan in effect as of the day before the enactment of the SAIA,[273] the Secretary of the military department concerned shall "complete negotiations with the Secretary of the Interior and the heads of the appropriate state agencies regarding changes to the plan that are necessary for the plan

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and classification). *Id.*
[270] *Id.*
[271] DoD Draft Guidance, *supra* note 100.
[272] Pub. L. No. 105-85, § 2905(d).

to constitute an [INRMP]."[274] The Amendments then require an opportunity for the submission of public comments on the "changes to cooperative plans" that are proposed so that the plans constitute INRMPs.[275]

After the 1997 Amendments passed, the DoD drafted guidance addressing the question of when and how to revise cooperative plans.[276] Reflecting the statutory requirement, the DoD draft guidance directs its component agencies to review all preexisting cooperative plans and identify any changes required to modify them to meet the criteria for INRMPs.[277] However, the draft guidance goes on to assert that "many existing cooperative plans may [already] meet the more stringent requirements for INRMPs established by the SAIA."[278] Relying on conference language that states, "The conferees intend that the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment,"[279] the DoD directs its components to "adhere to the Congressional intent to 'grandfather' existing cooperative plans for their remaining anticipated period of applicability (not to exceed five years)."[280]

The DoD's draft guidance is questionable for several reasons. The SAIA unequivocally mandates that the Secretary of each Military Department prepare and begin implementing INRMPs for those installations where an INRMP is appropriate by November 18, 2001.[281] The statute gives no indication that a cooperative plan may suffice where an INRMP is called for. To the contrary, the statute specifically requires pre-

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[273] Pub. L. No. 105-85, § 2905(c)(2).
[274] Pub. L. No. 105-85, § 2905(c).
[275] Pub. L. No. 105-85, § 2905(d).
[276] DoD Draft Guidance, *supra* note 100.
[277] *Id.*
[278] *Id.*
[279] H.R. CONF. REP. NO. 105-340, at 870 (1997).
[280] DoD Draft Guidance, *supra* note 100.
[281] Pub. L. No. 105-85, § 2905.

existing cooperative plans be re-negotiated to transform them into INRMPs.[282] The DoD draft guidance, on the other hand, seems to equate at least some cooperative plans to INRMPs.[283] The conference language the DoD relies on, however, was arguably referring to pre-existing INRMPs, not cooperative plans.[284] Even if the conferees did intend that some cooperative plans are equivalent to INRMPs, neither the statute nor the DoD identifies specifically what "more stringent requirements for INRMPs established by the SAIA" these cooperative plans must meet. For example, one may be the public comment requirement that debuted in the SAIA,[285] meaning cooperative plans that did not provide for public comment are not eligible to be grandfathered. It is unclear what the other equivalency requirements are, and this elusiveness will make it difficult, if not impossible, for military departments to accurately identify which cooperative plans may be grandfathered. As for the November 2001 deadline for completing INRMPs, the DoD directs only those installations "that have neither a [pre-existing] cooperative plan nor an INRMP" to meet the deadline.[286]

The DoD draft guidance on whether or not to re-accomplish cooperative plans is not completely consistent with the SAIA. The DoD may want to give higher priority to INRMPs for installations with no plans currently. The SAIA, however, clearly requires that by 2001 all installations have INRMPs in place. In what may be ill-advised reliance on legislative history, the DoD draft guidance seems to disregard this deadline, directing "unless special circumstances warrant, existing cooperative plans should not be revised in

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[282] *Id.*
[283] DoD Draft Guidance, *supra* note 100.
[284] *See infra* note 288 and accompanying text.
[285] *See* DoD Draft Guidance, *supra* note 100; *see also* discussion *infra* at note 341 and accompanying text (in order to assess the extent to which plans comply with the SAIA, DoD requires military departments to report on whether or not the public had an opportunity to comment on INRMPs).
[286] DoD Draft Guidance, *supra* note 100.

advance of the normal five year period."[287]

Plans in the second category, INRMPs completed before the passage of the 1997 Amendments, are not directly addressed by the SAIA. Legislators, however, were aware of these INRMPs, and according to the legislative history, did not intend for existing INRMPs which meet the requirements of the 1997 Amendments to be re-accomplished:

> The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment.[288]

Unfortunately, it is not clear what "the criteria established under this provision" include. As discussed above, however, the public comment requirement is most likely one of the criteria. This becomes an issue because, although each military service has guidance that calls for NEPA compliance, many INRMPs completed before the 1997 Amendments were not accompanied by an EA or EIS.[289] Consequently, many existing INRMPs did not provide for public comment. Following this reasoning to its logical conclusion, these INRMPs cannot be grandfathered, but must be re-accomplished to meet the requirements of the SAIA.

Faced with a statutory deadline of 2001 to have INRMPs in place on all applicable military installations, a significant issue for the DoD and the military departments is what,

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[287] *Id.*

[288] H.R. CONF. REP. NO. 105-340, at 870 (1997).

[289] Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters U.S. Air Force Environmental Division (Apr. 13, 1998) (discussing Air Force INRMPs); interview with Dr. Vic Diersing, Chief Conservation, Office of the Assistant Chief of Staff of the Army for Installation Management (June 4, 1998) (discussing Army INRMPs); interview with Mr Lew Shotton, Office of the Assistant Secretary of the

if anything, to do with the INRMPs previously completed. The requirements of the SAIA apply only to those INRMPs created or revised after the effective date of the statute. Therefore, for a previously existing INRMP, a plaintiff could sue under the APA alleging that the INRMP did not comply with NEPA, but would have no litigation foothold arguing the INRMP did not allow for public comment under the subsequently passed SAIA.

This safe haven will not last, however. As of 18 November 2001, installations must have an INRMP in place that complies with all the requirements of the SAIA.[290] To accomplish this, the DoD must identify what the specific criteria are that will ensure an INRMP complies fully with the SAIA, and give this guidance to the military departments. The military departments must, in turn, compare each INRMP to these criteria and discern those that already pass muster under the SAIA from those that require revisions. The new public comment requirement may be a good initial screen for installations as to whether or not to re-open their plans.

D. Implementation Issues

Another significant issue that received attention throughout the negotiations over the provisions of the SAIA was how to ensure the INRMPs, once finalized, would be implemented.[291] The issue implicates funding for the plans themselves as well as the activities and projects called for by the plans. Integrally related to implementation are the new reporting requirements levied by Congress to oversee how ardently the DoD and the military departments comply with the terms of the 1997 Amendments.[292] As agency

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Navy for Installations and Environment (July 8, 1998).

[290] Pub. L. No. 105-85, § 2905(c).

[291] *See infra* notes 297-314 and accompanying text.

[292] *See* Pub. L. No. 105-85, § 2905 (review for preparation of INRMPs), § 2907 (annual reviews and

planners endeavor to create and implement plans that comply with the requirements of the Amendments, agency attorneys must prepare to defend against legal challenges to the plans.

1. Mandatory Implementation of the Plans

Historically, Congress has been disappointed with DoD's efforts to attain the goals of the Sikes Act.[293] Although the language of the statute prior to the 1997 Amendments did not mandate action by the Secretary of Defense, Congress has continuously scrutinized the extent to which the Secretary has fulfilled the terms of the Sikes Act.[294] DoD's consistent failure to request funds under the Sikes Act has long been a source of dissatisfaction in Congress, as recorded in the legislative history of the 1978, 1982, and 1986 amendments.[295] Representative Saxton pointed out in his 1995 statement promoting House Bill 1141, that while authorization of appropriations under the Sikes Act expired on September 30, 1993, "Congress has not appropriated any money for the Sikes Act in over a decade."[296]

DoD's failure to fund conservation programs became central to the debate over the language of the Amendments in 1994. While introducing House Bill 3300, Congressman Studds noted that "many military installations have considered the requirements of the Sikes Act optional and have not requested funding."[297] Congressman Studds' criticism that conservation programs were under-funded at a time when the overall DoD

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reports).
[293] *See generally*, Jaynes, *supra* note 26, at 38-45.
[294] *Id.*, at 38-44.
[295] *Id.*, at 38-45.
[296] *Striped Bass Conservation: Hearings on H.R. 1141 Before the Subcomm. On Fisheries, Wildlife, and Oceans of the House of Representatives Comm. On Resources*, 104th Cong. (1995).
[297] Studds, June 29, 1994, *supra* note 46.

environmental budget was increasing[298] was chorused by the Chairman of the Board of Directors of the National Wildlife Federation.[299] Calling the bill a "terrific investment for the American people,"[300] the chairman championed the bill for making mandatory the requirement that military installations implement natural resources management plans.[301] The idea of budgeting for proactive conservation measures in the present, instead of paying degrees of magnitude more for clean-up and restoration in the future, was a recurring theme in the lengthy process to amend the Sikes Act.[302]

Focusing on funding, the president of the NMFWA testified in a 1995 hearing that the FY 95 DoD environmental budget allocated ninety percent to restoration and compliance and ten percent to prevention and conservation.[303] More specifically, he pointed out that the DoD spent about 2.2 percent of its environmental budget at that time for conservation programs.[304] About one percent of this amount consisted of appropriations under the Legacy Resource Management Program,[305] created by Congress in 1991.[306] The funds provided under the Legacy program have been used throughout the DoD for conservation and restoration projects.[307] However, this source of funds is not a panacea for those who want more money spent on conservation efforts. Although the Legacy program provided a much needed infusion for "historically low stewardship

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[298] *Id.*
[299] Stout, June 29, 1994, *supra* note 96.
[300] *Id.*
[301] *Id.* (Mr. Stout decried the current system as one that allocates money based on noncompliance rather than a commitment toward preventing noncompliance. He specifically cited the Army's successful Integrated Training Area Management (ITAM) program as one being cut back because it is largely proactive and not compliance driven.). *Id.*
[302] *See* Kerns, Mar. 16, 1995, *supra* note 56.
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] Lillie and Ripley, *supra* note 12, at 75.
[307] *Id.*

funding," it was not meant to serve as a long-term funding source.[308]

When asked during a 1994 hearing considering House Bill 3300 what the barriers were to full implementation of existing cooperative plans, Ms. Goodman cited a lack of adequate fiscal resources to meet conservation needs, and a lack of sufficient numbers of trained resources management personnel.[309] She went on to describe the competition that exists for funds to fulfill not only other environmental needs, but also other mission priorities.[310] Ms. Goodman touted a policy statement she issued asking military departments to give consideration to natural and cultural resources compliance requirements equal to that given other environmental requirements.[311] She stated that every military department has a separate budget item for conservation, allowing for the "identification, monitoring and funding of natural and cultural resources requirements."[312] Ms. Goodman indicated that the DoD was creating a funding "prioritization system" to identify "urgent natural resource needs" and would fund them accordingly.[313] Under this system, she reported, the preparation and implementation of INRMPs would be "among the highest priorities for funding."[314]

Within the DoD, the priority of funding requirements is the key component to determining what items are and are not ultimately funded. During the hearings on the Sikes Act Amendments, a much berated culprit for DoD's funding priorities and the resulting lack of money for conservation activities was Office of Management and Budget

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[308] *Id.*
[309] Goodman testimony, June 29, 1994, *supra* note 100, at 145 (responding to a question posed by Mr. McCurdy). *Id.*
[310] *Id.* at 146.
[311] *Id.*
[312] *Id.*
[313] Goodman, June 29, 1994, *supra* note 9.
[314] *Id.*

(OMB) Circular A-106.[315] Under the circular's terms, "priority for funding goes to installations that are (or soon will be) in physical noncompliance with the law, have received a Notice of Violation from a federal or state agency, or have signed a compliance agreement or consent order."[316]

DoD's environmental budgeting priorities, based on OMB Circular A-106, are found in its 1996 Instruction.[317] The DoD divides activities requiring funding into four prioritized classifications:[318]

> Class 0: Recurring Natural and Cultural Resources Conservation Management Requirements.
> Includes activities needed to cover the recurring administrative, personnel, and other costs associated with managing DoD's conservation program that are necessary to meet applicable compliance requirements (Federal and State laws, regulations, Presidential Executive Orders, and DoD policies) or which are in direct support of the military mission.
>
> Class I: Current Compliance.
> Includes projects and activities needed because an installation is currently out of compliance (has received an enforcement action from a duly authorized Federal or State agency, or local authority); has signed a compliance agreement or has received a consent order; has not met requirements based on applicable Federal or State laws, regulations, standards, Presidential Executive orders, or DoD policies . . . . Class I also includes projects and activities needed that are not currently out of compliance (deadlines and requirements have been established by applicable laws, regulations, standards, DoD policies, or Presidential Executive orders, but deadlines have not passed or requirements are not in force) but shall [sic] be if projects or activities are not implemented in the current program year.
>
> Class II: Maintenance Requirements.
> Includes those projects and activities needed that are not currently out of compliance (deadlines or requirements have been established by applicable laws, regulations, standards, Presidential Executive orders, or

[315] "Reporting Requirements in Connection With the Prevention, Control and Abatement of Environmental Pollution at Existing Federal Facilities" (Dec. 31, 1974) (rescinded). *See* Stout, 29 June 1994, *supra* note 96; Kerns, Mar. 16, 1995, *supra* note 56.
[316] H.R. REP. NO. 103-718, at 6 (1994).
[317] DoDI 4715.3, *supra* note 11, at encl. 4.
[318] *Id.*

> DoD policies but deadlines have not passed or requirements are not in force) but shall [sic] be out of compliance if projects or activities are not implemented in time to meet an established deadline beyond the current program year.
>
> Class III: Enhancement Actions. Beyond Compliance.
> Includes those projects and activities that enhance conservation resources or the integrity of the installation mission, or are needed to address overall environmental goals and objectives, but are not specifically required under regulation or Executive order and are not of an immediate nature.[319]

The Instruction directs that all natural and cultural resources compliance requirements be categorized based on these classes.[320] The Instruction further mandates, "All projects in Classes 0, I, and II shall be funded consistent with timely execution to meet future deadlines."[321] Expounding on each of the classes, the Instruction lists "planning" under Class I, giving INRMPs as an example.[322]

It is clear from the DoD Instruction that the INRMPs themselves are "must fund" items. However, at least some of the projects or activities contained within an INRMP may fall into Class III and be difficult to fund, such as:

> (1) Community outreach activities, such as "Earth Day" and "Historic Preservation Week" activities;
> (2) Educational and public awareness projects, such as interpretive displays, oral histories, "watchable wildlife" areas, nature trails, wildlife checklists, and conservation teaching materials;
> [3] Restoration or enhancement of cultural or natural resources when no specific compliance requirement dictates a course or timing of action; and
> [4] Management and execution of volunteer and partnership programs.[323]

Although the SAIA does not directly address DoD's funding priority scheme, it contains two provisions aimed at lessening the budget woes of the military departments. One provision was included to "facilitate the execution of seasonal conservation

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[319] *Id.*
[320] DoDI 4715.3, *supra* note 11, at para. (F)(1)(c).
[321] *Id.*
[322] DoDI 4715.3, *supra* note 11, at encl. 4.

projects."[324] It allows that "funds appropriated to DoD for a fiscal year may be obligated to cover the cost of goods and services provided under an agreement . . . during any 18-month period beginning in that fiscal year, without regard to whether the agreement crosses fiscal years."[325] The second provision was the deletion of the requirement for cost sharing and cost matching.[326] This provides alternatives to natural resources managers who previously used "traditional contracting" for projects,[327] and paves the way for groups that could not otherwise afford a matching cost contribution to participate with projects.[328] In response to the first provision, the DoD draft guidance advises the military departments to "develop policies that delegate cooperative agreement authority to installation level and convey the authority to obligate funds beyond the current fiscal year."[329] The DoD draft guidance does not otherwise address the SAIA or funding priorities, and nothing indicates it will alter the budget guidance found in its 1996 Instruction[330] in response to the SAIA.

2. Reporting Requirements

Central to the implementation requirements of the Sikes Act, and related to funding issues, is the recurring reporting requirement found in the 1997 Amendments.[331]

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[323] *Id.*
[324] DoD Draft Guidance, *supra* note 100.
[325] Pub. L. No. 105-85, § 2908.
[326] Pub. L. No. 105-85, § 2908(2). The SAIA retained language allowing the Secretary of a military department (formerly "Secretary of Defense") to enter into cooperative agreements with States, local governments, nongovernmental organizations, and individuals to provide for the maintenance and improvement of natural resources on or to benefit natural and historical research on, Department of Defense installations, *see id.* at § 2908(1). The provision deleted by the SAIA required the parties to these agreements to contribute funds or to furnish services on a matching basis to defray the cost of the programs, projects, and activities under the agreements, *see* 16 U.S.C.A. § 670c-1(b) (amended 1997).
[327] Air Force Draft Guidance, *supra* note 107, at 12.
[328] *Id.*
[329] DoD Draft Guidance, *supra* note 100.
[330] DoDI 4715.3, *supra* note 11, at encl. 4.
[331] Kerns, Mar. 16, 1995, *supra* note 56. *See* Pub. L. No. 105-85, § 2907. The SAIA contains another reporting provision that is not recurring, *see* Pub. L. No. 105-85, § 2905 (requiring one-time report, due

This requirement for a report, due on March 1 of each year,[332] can be traced to the notice of violation (NOV) provision that first appeared in House Bill 3300.[333] The NOV provision, which served as a device to raise natural resources conservation issues to a high enough priority level so they would be funded,[334] was dropped based largely on the assurances of the DoD that INRMPs would be a priority.[335] Even so, instead of just deleting the NOV provision, Congress replaced it with a comprehensive reporting requirement.[336] Undergoing only minor alterations throughout the several foregoing bills, the reporting provision was enacted as follows:

> Not later than March 1 of each year, the Secretary of Defense shall review the extent to which [INRMPs] were prepared or were in effect and implemented in accordance with this title in the preceding year, and submit a report on the findings of the review to the committees.[337] Each report shall include:
> (A) the number of [INRMPs] in effect in the year covered by the report, including the date on which each plan was issued in final form or most recently revised;
> (B) the amount expended on conservation activities conducted pursuant to the plans in the year covered by the report; and
> (C) an assessment of the extent to which the plans comply with this title.[338]

Designed to ensure the DoD plans and procedures comply fully with the Sikes Act

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Nov. 1998, in which the Secretary of Defense must submit to congress "a list of the military installations [for which] the preparation of an INRMP is not appropriate," and an explanation of the underlying reasons for each). *Id.* For a discussion of this reporting requirement, *see supra* notes 111-116 and accompanying text.

[332] *See* DoD Draft Guidance, *supra* note 100 (DoD will submit its first report in 1999). *Id.*

[333] *Hearing on Conservation of Rhinos and Reauthorization of the Sikes Act Before the Subcomm. on Environment and Natural Resources of the House of Representatives Comm. on Merchant Marine and Fisheries*, 103rd Cong. 189-194 (1993) (H.R. 3300 § 5).

[334] Wray, Nov. 3, 1993, *supra* note 57; *See also* Stout, June 29, 1994, *supra* note 96 (explaining National Wildlife Federation position that if DoD would issue a policy letter saying they will fund INRMPs, there would be no need for the enforcement clause). *Id.*

[335] H.R. REP. NO. 103-718, at 6 (1994).

[336] H.R. REP. NO. 103-718, at 3 (1994) (H.R. 3300 § 5).

[337] *See* Pub. L. No. 105-85, § 2907 (defining "committees" as the Committee on Resources and the Committee on National Security of the House of Representatives; and the Committee on Armed Services and the Committee on Environment and Public Works of the Senate). *Id.*

[338] Pub. L. No. 105-85, § 2907.

Amendments, this reporting provision serves essentially the same purpose as the compliance provisions would have.[339] As the president of the NMFWA described:

> The reports submitted to Congress will provide the public with a clear picture of Defense's commitment to conservation of the natural resources and lands under its control. It is our wish that Congress never has to resort to fines to force compliance with this common sense Act. Money spent on punitive fines is just money diverted from vital Defense programs, such as this one.[340]

The first two pieces of information to be reported, the number of plans and monetary amount spent, are easily determined and provide an objective view of DoD's progress in fulfilling the basic mandates of the Act: to prepare and implement INRMPs. Conversely, the third piece of information, an overall assessment of the extent to which INRMPs comply with the 1997 Amendments, is more subjective and requires further interpretation as to what exactly must be reported. In draft guidance to the military departments on how to respond to this query, the DoD instructed them to answer yes or no to the following questions for each INRMP:

> (1) Whether the INRMP was coordinated with the [US]FWS and appropriate State fish and wildlife agencies;
> (2) Whether the public had an opportunity to comment on the INRMP;
> (3) Whether the INRMP has a current list of projects or methodologies essential to implement the plan's objectives for the next fiscal year.[341]

This information corresponds to the statutory requirements for mutual agreement, public comment, and mandatory implementation of the INRMPS, respectively.

In its third question, DoD's reference to a "list of projects or methodologies" seems to indicate that implementation includes a subset of projects, taken from all the possible projects listed or described in the INRMP. In other words, the DoD considers an

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[339] Kerns, 16 Mar. 1995, *supra* note 56.
[340] *Id.*
[341] DoD Draft Guidance, *supra* note 100.

INRMP "implemented," even if not everything called for in the plan is funded. Other interpretations of what is meant by "implementation" and how to report on that, have been offered and may be pictured as existing along a continuum. At one end is the Army's suggestion, which was not incorporated into the DoD guidance, that the military services merely report whether the plan "is preventing the net loss of land for mission purposes,"[342] without offering details as to how that has been achieved under a given INRMP.[343] In the middle of the continuum is the the DoD draft guidance, seemingly saying some projects under the plan should be identified as benchmarks, and the progress of their implementation reported as an indicator of the implementation of the plan itself.

At the far end of the continuum is the position of NMFWA. NMFWA interprets the statutory language "shall prepare and implement an [INRMP]"[344] as a requirement to "conduct all the projects and activities in the plan, not just sign the plan."[345] NMFWA goes on to say, "Once signed, the INRMPs should take on the funding status of any similar, interagency compliance agreement (Class I or II)."[346] NMFWA is joined in its position by the National Wildlife Federation (NWF). At a committee hearing on House Bill 3300, a NWF spokesman expressed the fear that the military [would] ignore the plans and continue to fund environmental requirements on a compliance-oriented basis instead of a proactive conservation-oriented one.[347] Calling the required implementation of the INRMPs "perhaps the greatest overall improvement in this revision of the Sikes Act," he

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[342] Memorandum from Department of the Army, Office of the Assistant Secretary for Installations, Logistics, and Environment, to Deputy Under Secretary of Defense (Environmental Security) (May 29, 1998) (on file with author).
[343] *Id.* ("yes" or "no" response only). *Id.*
[344] Pub. L. No. 105-85, § 2904(a).
[345] NAT'L MILITARY FISH AND WILDLIFE ASS'N, THE ANNOTATED SIKES ACT AS AMENDED THROUGH DEC. 1997 3 (1998).
[346] *Id.* (referring to DoD budget priority classifications); *see supra* notes 317-322 and accompanying text).
[347] Stout, June 29, 1994, *supra* note 96.

characterized the implementation requirement as the solution to the problem that "all too often, good planing efforts have sat on the shelf awaiting implementation funding."[348]

The reason for these differing views seems to be different answers to the question: how many of the items contained within an INRMP must be funded to constitute "implementation" of the plan?[349] The middle-of-the-road approach taken by the DoD in its draft guidance seems more reasonable than that taken by NMFWA, in that it will almost certainly be impossible to immediately fund every action or project contained in a given INRMP. The genesis of the DoD approach can be seen in early testimony to Congress by Ms. Goodman.

> Mr. McCurdy: Does the Department consider that once a[n installation] commander has accepted a resource management plan, there is a commitment to fund and implement the plan's elements?
>
> Ms. Goodman: An effective resource management plan is a dynamic, comprehensive document. It should also be flexible, able to accommodate changing circumstances and requirements. We believe that a[n installation] commander should plan to implement compliance-based requirements of an integrated natural resource management plan with the same priority as all other environmental compliance requirements. Other plan elements should be funded whenever possible, to enhance resource stewardship. However, we believe that for these non-critical elements the plan should serve as the guidance document which it is intended to be, rather than as an absolute mandate to commit funds. The plans provide visibility to the conservation requirements. However, installation commanders must have the flexibility to establish priorities that support mission requirements.[350]

Although the Army's suggested approach of reporting on "no net loss" was not meant to address the question of what constitutes "implementation,"[351] it is nonetheless

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[348] *Id.*

[349] Interview with Dr. J. Douglas Ripley, Natural Resources Manager, Headquarters U.S. Air Force Environmental Division (Apr. 13, 1998).

[350] *Management of Natural Resources on DoD Lands: Hearings on H.R. 3300 and H.R. 2080 Before the Subcomm. on Military Installations and Facilities of the House of Representatives Comm. on Armed Services*, 103rd Cong. 147 (1994).

[351] See Army Memorandum, *supra* note 342, (suggesting DoD modify its reporting parameters under Pub.

helpful in analyzing what information should be reported to address whether an INRMP has been implemented. The mere statement that there has been "no net loss of land for mission purposes" seems too vague to provide meaningful information on the progress made in implementing a plan. However, the Army finds support for its position in an earlier bill, where the "assessment of the extent to which the plans comply with the requirements of [the Act]" specifically required information as to "the extent to which . . . there is no net loss of lands to support the military missions of military installations."[352]

The Army position highlights that there is more than one way to assess the extent to which the plans comply with the 1997 Amendments. In its draft guidance, the DoD has linked compliance to three discreet pieces of information corresponding to mutual agreement, public comment, and mandatory implementation of the INRMPs. However, the DoD fails to mention other requirements of the Sikes Act that may just as validly be considered compliance assessors. For example, the Act specifically delineates ten required elements of INRMPs:

> Consistent with the use of military installations to ensure the preparedness of the Armed Forces, each [INRMP] prepared under [this Title] shall, to the extent appropriate and applicable, provide for:
> (A) fish and wildlife management, land management, forest management, and fish- and wildlife-oriented recreation;
> (B) fish and wildlife habitat enhancement or modifications;
> (C) wetland protection, enhancement, and restoration, where necessary for support of fish, wildlife, or plants;
> (D) integration of, and consistency among, the various activities conducted under the plan;
> (E) establishment of specific natural resource management goals and objectives and time frames for proposed action;
> (F) sustainable use by the public of natural resources to the extent that the use is not inconsistent with the needs of fish and wildlife resources;
> (G) public access to the military installation that is necessary or appropriate for the use described in subparagraph (F), subject to

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L. No. 105-85, § 2907 recurring reporting requirement). *Id.*
[352] H.R. REP. NO. 103-718, at 3 (1994) (H.R. 3300 § 5).

requirements necessary to ensure safety and military security;
(H) enforcement of applicable natural resource laws (including regulations);
(I) no net loss in the capability of military installation lands to support the military mission of the installation; and
(J) such other activities as the Secretary of the military department determines appropriate.[353]

Currently, the DoD does not require its component departments to report on how well their INRMPs meet these statutory requirements in order to assess their compliance with the 1997 Amendments. It is unclear, however, how the DoD will ultimately choose to word its guidance to the military departments concerning how to assess whether and how well INRMP implementation satisfies the statutory mandates.

3. Facing Legal Challenges

As discussed above, the Sikes Act Amendments constitute a statutory mandate where there was previously only departmental regulatory guidance.[354] This has enhanced the level of attention INRMPs receive from the DoD and may serve as a catalyst for increased public participation as well. The Amendments may also precipitate judicial challenges to the content or implementation of the plans.

A recent Supreme Court case, decided on the issue of ripeness, is instructive as to what factors will weigh in the government's favor when faced with a legal challenge to an INRMP. The case addresses the question of when will a court review a natural resources management plan to assess its conformity with the underlying statute. As such, the case serves as guidance on how to develop and implement INRMPs.

In *Ohio Forestry Association, Inc. v. Sierra Club*,[355] the Sierra Club challenged a land resource management plan (LRMP) developed by the U.S. Forest Service pursuant to

[353] Pub. L. No. 105-85, § 2904.
[354] *See* discussion *supra* notes 118-124 and accompanying text.

the National Forest Management Act of 1976 (NFMA).[356] NFMA, passed after the landmark Monongahela decision,[357] amounted to a new organic act for the Forest Service.[358] NFMA "addresse[s] on-the-ground forestry issues with a specificity unthinkable in earlier times."[359] In part, NFMA requires the Secretary of Agriculture to "'develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.'"[360] Like DoD's INRMPs, the Forest Service uses LRMPs to "'guide all natural resource management activities,'" including use of land for "'outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.'"[361]

In *Ohio*, the Sierra Club contended that the plan permitted too much logging and too much clearcutting, in violation of the NFMA.[362] In a unanimous decision, the Court held the dispute was not ripe for court review.[363] According to the Court, the purpose of the ripeness requirement is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[364]

The Court found that the LRMP in question, developed for the Wayne National Forest in southern Ohio, "sets logging goals, selects the areas of the forest that are suited

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[355] 140 L.Ed.2d 921 (1998).
[356] *Id.* at 1668
[357] West Virginia Div. Of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975) (holding that several Forest Service contracts allowing clearcutting in the Monongahela National Forest of West Virginia did not comply with the Organic Act of 1897). *Id.*
[358] COGGINS, *supra* note 147, at 641.
[359] *Id.*
[360] *Ohio*, at 1668 (citations omitted).
[361] *Id.* (citations omitted).
[362] *Id.* (Among the requested relief, plaintiffs sought a declaration that the plan was unlawful and an injunction prohibiting the defendants from permitting or directing further timber harvest and/or below-cost timber sales until the plan was revised.)
[363] *Ohio*, at 1666.
[364] *Id.* at 1670 (citations omitted).

to timber production, and determines which 'probable methods of timber harvest' are appropriate."[365] In fact, the plan is a precondition to logging.[366] However, the Court concluded the case was not yet justiciable because the plan did not, by its terms, authorize "the cutting of any trees."[367] The procedural steps required before proceeding with an actual timber harvest included conducting NEPA analysis and ensuring the discrete project was consistent with the plan.[368]

Explaining its rationale, the Court identified from its jurisprudence two considerations relevant in determining ripeness: 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'[369] The Court further dissected these into three issues concerning the LRMP: "(1) whether delayed review would cause hardships to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[370] The Court concluded that the LRMP did not have enough impact on its own to create a justiciable issue. The Court reasoned that the plan's provisions "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations."[371] The Court refused to embark upon a "time-consuming judicial consideration of the details of an elaborate, technically based plan . . . without the benefit of the focus that a particular logging

[365] *Id.* at 1668 (citations omitted).
[366] *Id.* at 1669.
[367] *Id.* at 1668.
[368] *Id.* at 1668-1669.
[369] *Id.* at 1670 (citing Abbott Laboratories V. Gardner, 387 U.S. 136, 148-149).
[370] *Id.*
[371] *Id.* (paraphrasing language in United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309-310).

proposal could provide."[372]

INRMPs, like LRMPs, recommend procedures for managing natural resources. Specifically, INRMPs provide for natural resources management that is compatible with the installation mission, satisfies legal requirements, and incorporates ecosystem management principles and guidelines."[373] INRMPs identify the types and locations of actions that may affect natural resources, and prioritize those actions required to implement the goals and objectives of the plan.[374] Additionally, both INRMPs and LRMPs are subject to periodic review and revision.[375]

Given the recent Supreme Court decision and the similarities between LRMPs and INRMPs, if faced with a legal challenge that an INRMP does not comply with the Sikes Act Amendments, a key argument for DoD attorneys to make is that the issue is not ripe for judicial review.[376] The argument will be most persuasive if agency attorneys can enumerate the procedural steps required before the challenged project or projects listed within the plan can be implemented. The agency attorneys will also want to argue that "immediate judicial review could hinder agency efforts to refine its policies . . . [either] through revision of the plan or through application of the plan in practice."[377] As the Court pointed out in *Ohio*, "premature review 'denies the agency an opportunity to correct its own mistakes and to apply its expertise.'"[378] Plaintiffs may argue, as they did in *Ohio*,

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[372] *Id.* at 1671-1672.
[373] DoDI 4715.3, *supra* note 11, at encl. 7.
[374] *Id.*
[375] *See* 16 U.S.C.A. § 1604(a) (LRMP must be revised as appropriate); Pub. L. No. 105-85, § 2904 (calling for periodic review and revision of INRMPs).
[376] Note that ripeness will probably not be a winning issue for the agency on challenges based on failure of the INRMP to comply with NEPA. As the Ohio Court pointed out, "A person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." Ohio p. 1672.
[377] *Ohio*, p. 1671.
[378] *Id.* (citations omitted).

that "it will be easier, and certainly cheaper, to mount one legal challenge against the Plan now, than to pursue many challenges to each site-specific . . . decision to which the Plan might eventually lead."[379] Once again, agency counsel's argument has been provided by the Supreme Court:

> [T]he Court has not considered this kind of litigation cost-saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – post-implementation litigation.[380]

As long as the "harm" raised by the plaintiffs is not caused by the plan, but by some remote future action to be taken based on the plan, a challenge based on that harm will not be ripe for judicial review. If, however, the plan itself results in "harm," the result will most likely be different. For example, in *Ohio*, the Sierra Club argued that under the LMRP many "intrusive" activities (e.g., opening trails to motorcycles or using heavy machinery) would be conducted "without any additional consideration of their impact on wilderness recreation."[381] Additionally, Sierra Club pointed to actions that would not take place on land designated for logging, such as building additional hiking trails.[382] The *Ohio* Court did not consider these arguments because they had not been raised in the lower court.[383] Dicta indicates, however, that had these facts been alleged appropriately, the analysis would have been "significantly different."[384]

The implication of *Ohio* for INRMPs is that any actions that can take place, or fail to take place, based solely on the plan itself will be ripe for legal challenge as soon as the

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[379] *Id.*
[380] *Id.*
[381] *Id.* at 1672.
[382] *Id.*
[383] *Id.* at 1672-1673 (argument fatally flawed because it first appears in briefs to Supreme Court on the merits). *Id.*
[384] *Id.* at 1673.

plan is finalized. Therefore, to avoid a challenge on the more complicated, controversial, or long-range actions, planners may want to highlight within the plan the additional procedures that must take place before those actions can be implemented. If the plan is prepared in concert with NEPA analysis, the NEPA documentation should discern those actions that will take place automatically from those requiring further implementing steps. This will help raise public awareness to impending activities and may lead to dispute resolution before the plan is finalized.

IV. CONCLUSION

The 1997 Amendments to the Sikes Act pose interesting legal challenges to the DoD and the military departments. The statutory provisions take away much of the discretion DoD previously enjoyed, and create vulnerabilities to judicial scrutiny previously unknown. Although the four years of negotiating the language of the Act brought the DoD closer to its desired result, ambiguities and uncertainties still exist. For example, the provision calling for public comment seems to have been overlooked during the protracted negotiations, its impact underestimated. Another difficult issue is what is meant by "mandatory implementation." Furthermore, despite the amendments' mandate that INRMPs be implemented, the journey of the specific proposals contained in those plans through the defense budgeting and funding system may still be a long one.

Although the draft guidance provides a preview, it remains to be seen precisely how the DoD and the military departments will implement the SAIA. The task of determining how many INRMPs have to be re-accomplished to comply with the SAIA, is a daunting one. Additionally, whatever NEPA documentation is required to complete the plans will potentially consume not only the statutory clock, which is ticking toward a 2001

deadline, but also the defense environmental budget. One thing does seem clear: the issues that arise are best addressed early by the military departments. Otherwise, the military may be faced with unpopular resolutions handed down from either Congress, as it reviews reports on the military's progress in implementing the SAIA, or, possibly less sympathetic arbiters, the courts.